[2017] UKFTT 342 (TC)

TC05819

Appeal number: TC/2015/00361

EXCISE DUTY – Beer duty – Constructive removal of beer – Whether duty chargeable on actual ABV or ABV as stated on labels, invoices and delivery notes – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOLSON COORS BREWING COMPANY (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
GILL HUNTER

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 27, 28 February and 1, 2, 3 March 2017

Sam Grodzinski QC, instructed by Pinsent Masons LLP, for the Appellant

Andrew Macnab, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The issue arising in this appeal is whether duty on beer produced in the United Kingdom should be charged on the basis of its actual alcoholic strength or the higher strength shown on its packaging.

2. By way of a brief introduction, beer brewed in the United Kingdom is subject to excise duty at a rate determined by its alcoholic strength as measured by its alcohol by volume ("ABV"). Under Regulation 18 of the Beer Regulations 1993, the strength of the beer is "deemed" to be the greater of its actual strength or that stated on a packaging label, invoice, delivery note or similar document.

3. Under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, an excise duty point arises when the beer is "released for consumption", which in the case, such as the present, of a duty suspension arrangement includes the time the beer left the brewery. However, Regulation 15A of the Beer Regulations 1993 allows a registered brewer to constructively remove the beer so that it is deemed to have left the premises at a time before it actually leaves the brewery. As paragraph 7.5 of HM Revenue and Customs Notice 226 'Beer Duty' explains:

> "If you consider it would help your business to account for duty on any duty suspended beer in advance of delivery from registered premises, you may do so. This is known as 'constructive removal' and allows the registered holder of the beer to change the status of the beer held on registered premises from duty suspended to duty paid, on payment of the proper duty, without the need to remove the beer from those premises."

4. Since September 2012 Molson Coors Brewing Company (UK) Limited ("MCBC"), a registered brewer, has calculated excise duty relying on a constructive removal of the beer from duty suspension using the actual ABV of each batch of beer at that point in time. However, HM Revenue and Customs ("HMRC") say that MCBC should have calculated its liability by reference to the higher ABV shown on its packaging, invoices and delivery notes and have issued assessments for duty in the sum of £40,911,423, relating to the two year period from 1 September 2012 to 31 August 2014; and in the sum of £10,417,345, relating to the period from 1 September 2014 to 31 January 2015. This is MCBC's appeal against those assessments.

5. Mr Sam Grodzinski QC, who appears for MCBC, submits that MCBC was correct to have calculated its liability to duty by reference to the actual ABV of the beer whereas Mr Andrew Macnab for HMRC contends that MCBC has not made out its case on facts; that the relevant regulations do not bear the construction sought by MCBC; and that HMRC's interpretation of the regulations is consistent with European Union ("EU") law.

Evidence and Facts

Evidence

6. We heard from the following witnesses on behalf of MCBC:

(1) Mr Philip Rutherford, Vice President of Tax for Molson Coors Europe;

(2) Mr Neil Hayward MCBC's Head of Distribution;

(3) Mr Goran Matic, the Brewing Manager at MCBC's Burton Brewery;

(4) Mr Edward Storr, the Head of Global Supply Chain Transformation for MCBC;

(5) Mr Alan Thompson, who was, until he retired on 1 April 2016, the Packaging Manager of MCBC

7. Mr Rutherford began his evidence with a "WebEx" – a live demonstration, linked by internet to MCBC's Burton brewery, of the way in which MCBC's constructive removal records and systems operate, before explaining these in greater detail and how they are used by MCBC in the calculation of its liability to duty. Mr Rutherford told us that MCBC typically has the lowest margin in the supply chain and regularly looks for ways in which its cost base can be reduced and has previously introduced more efficient methods in its use of materials and staff. The rationale for introducing the new method of calculating its liability to duty was to achieve a reduction in its costs base as less duty would be payable on the actual ABV of the beer than if calculated on the basis of that stated on the label. He said that a "key driver" for the decision not to change the labelled ABV was to protect MCBC's cost base saving as many of its customers would "demand a slice" of the saving if this was reduced explaining that where other cost base saving methods had previously been introduced these were not necessarily communicated to customers.

8. In relation to the calculation of duty, Mr Rutherford in his first witness statement had said that the relevant record for constructive removal was the issuing of a packaging process order in the SAP system for the beer concerned or the issuing of a packing schedule in the case of its Prism system. In his second witness statement Mr Rutherford said that the point of constructive removal was the time when the beer left the bright beer tank (a large steel vessel used during the brewing process – see below). In his third witness statement Mr Rutherford explains the constructive removal process in greater detail. When cross-examined, he accepted that his explanation of the constructive removal process in his first two witness statements was too general and should have been more detailed and that the clarification in the third statement, which referred to the 'Historian' database not mentioned previously was necessary. He said that it was a "mistake" not to have mentioned "Historian" in the earlier witness statements.

9. However, and notwithstanding the failure to refer to the Historian database until his third witness statement, Mr Rutherford's evidence, which we accept in its entirety, was both clear and consistent. Cross-examined for a day Mr Rutherford explained that MCBC always understood that the relevant categories of beer were identifiable by their product codes and that the flow meters marked the duty point when beer was

constructively removed, confirming that duty was paid on this basis even though in one case some 26 barrels were lost between the flow meters and its eventual packaging.

10. Mr Hayward, who although not personally involved in the brewing process, confirmed that the beer was checked in the inlet buffer tank (a tank into which the beer flows after leaving the bright beer tank – see below) to ensure it was of sufficient quality to proceed to the next stage in the process. He also confirmed that while he did not presently play any part in the operational process as part of the implementation of the constructive removal process, the necessity of accurately measuring beer outside the bright beer tank had been made clear to him and that this is why the flow meters had been installed at that point. He said that it was "absolutely clear" that what went through the flow meter and what was stated on the flow meter (and the breweries' control system called iFIX) had to reflect what was transacted within Prism or Proficy (MCBC's systems which log data captured in a brewery into which the volume of beer measured by the flow meters is manually transferred. Prism was later replaced by the Proficy system).

11. Mr Matic confirmed his involvement in the brewing process and that he was not involved in the computation or calculation of Beer Duty. He explained that the target ABV to which Carling beer was brewed was 3.77% and that the operating limits were 3.6% to 4.4%.

12. Mr Storr confirmed that he was not personally concerned in the either the constructive removal of beer from MCBC's premises or the calculation of duty. He explained that an SKU was a unique identifier for any product sold to customers which had its own identifier SKU SAP number linked to an end selling unit that customers would order. He also confirmed that it would be possible to tell which SKUs are duty paid and which are not.

13. Mr Thompson, who gave evidence via the telephone from Austria where he was on holiday, explained the packaging schedule would be agreed at a meeting the Thursday of the week before it is implemented.

14. In addition, as they were unchallenged, the witness statements of Mr Paul Dove, MCBC's Vice President Global Research and Development and Mr Martin Coyle, MCBC's Marketing Director were admitted into evidence. Mr Dove's statement explains that, following taste tests on a range of different ABV values from just below 4% to 3.7%, in an attempt to establish the level at which there might be a negative reaction to any change in taste, it was found that consumers were "broadly tolerant" from a taste perspective if the ABV was reduced to 3.7%. Mr Dove also describes the Anton Paar Alcolyser system used to measure the ABV of the beer. Mr Coyle, in his witness statement provides further details of the taste tests undertaken confirming that consumers preferred the beer with a lower ABV over that with a higher one.

15. Mr Christopher Ball, the Customer Relationship Manager ("CRM") of HMRC for MCBC and Mrs Helen Winfield, a Higher Officer of HMRC who between November 1995 and October 2012 was a member of HMRC's internal Alcohol Unit

of Expertise, gave evidence on behalf of HMRC. Mrs Winfield had visited MCBC's brewery with another officer as part of a three year risk review on 6 August 2014. Both officers had attended a meeting with MCBC at their Burton brewery on 12 February 2015 at which the matters now under appeal were discussed.

16. Mrs Winfield also gave evidence, which we accept, in relation to work she had undertaken investigating excise duty drawback payments made by HMRC to parties other than MCBC in respect of cans of Carling lager which are produced by MCBC. She explained that excise duty drawback is a scheme that allows businesses to claim a refund of UK excise duty where it has been paid and the goods subsequently exported or destroyed, so as to prevent double taxation, first in the United Kingdom and then in the country in which the goods are to be consumed. Referring to copies of MCBC delivery notes that were provided to HMRC by businesses in support of their drawback claims, Mrs Winfield said that these showed that the beer supplied had an ABV of 4% and although HMRC had repaid the excise duty to those businesses on that basis, they had subsequently learned that MCBC had itself accounted for duty based on an alcoholic strength of 3.7% ABV.

17. In addition to the oral evidence and witness statements admitted into evidence we were provided with several bundles of documents contained in eight lever arch files. These included the witness statements and their exhibits and correspondence between the parties.

Statement of Agreed Facts

18. The parties produced the following Statement of Agreed Facts:

> *Introduction*
>
> (1) This consolidated appeal, brought under s 16 of the Finance Act 1994, is against the decisions of HMRC:
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> > (a) dated 7 October 2014, upholding their earlier assessment to beer duty in the sum of £40,911,423, relating to the two year period from 1 September 2012 to 31 August 2014; and
> >
> > (b) dated 27 February 2015, to issue an assessment for beer duty in the sum of £10,417,345, relating to the period from 1 September 2014 to 31 January 2015.
>
> (2) MCBC is part of a global Group which has a number of well-known brands, including Carling, Worthington's, Cobra, Coors Light and Molson Canadian. It is the United Kingdom's second largest beer company. It operates from a number of different breweries around the country, in Burton on Trent, Tadcaster and Alton (the last of which closed in May 2015) ("the Breweries").
>
> (3) The Burton Brewery and the Tadcaster Brewery are registered with HMRC under the Beer Regulations 1993 and the Alcoholic Liquor Duties Act 1979. The registrations cover (a) the production of beer (b) the holding of beer in suspension and (c) the classes of beer which may be held. The Alton Brewery was also registered before it closed.

MCBC's Brewing Process

(4) MCBC uses a computerised brewery control system at the Breweries called iFIX. The iFIX system is the computer interface used to control the various valves, tanks and machines that are themselves used during the brewing process. It also displays information about what is happening in each brewery and the measurements taken by various machines.

(5) The brewing process at the Breweries consists of all steps up to the beer being in the Bright Beer Tank ("BBT").

(6) During the first stage of the brewing process, malt is ground down into powder, at which point hot water is added to it to make "mash". A sugary liquid (referred to as "wort") is subsequently extracted from the mash and then yeast is added, after which the mixture is placed in a fermenting vessel for a period. Alcohol is produced by the yeast consuming the wort.

(7) MCBC uses a brewing technique for the relevant beer referred to as "high gravity brewing". This brewing technique involves initially fermenting the beer to a higher strength (say 8.5% ABV) than will ultimately be required.

(8) When the beer has reached the higher strength the mixture is then chilled to denature the yeast and stop the fermentation process. It is then placed in a conditioning vessel where it is allowed to rest.

(9) After the conditioning stage, the beer is piped through a filtration system to remove the yeast and other by-products. The beer subsequently undergoes blending whereby the beer is blended down with liquor to achieve the final strength, the required level of carbonation and certain other specified characteristics. "Liquor" is water which has been subject to reverse osmosis to lower both the salt and oxygen content before being chilled.

(10) During March and April 2013, new Anton Paar blending equipment was installed at the Breweries that allowed MCBC to blend the beer more accurately and achieve a greater degree of consistency in the ABV of the beer being produced. The new equipment was operational by the end of April 2013.

(11) After blending, the beer is moved through pipes to a BBT, which is a large vessel where the beer is stored before being packaged. If the beer in the BBT meets MCBC's specifications (see next section), it is then moved through pipes to the areas of the brewery where it is packaged into cans or kegs.

Quality Control

(12) The brewing technicians undertake tests on the beer in the BBT to ensure the filtration and blending have achieved the required parameters and to test whether it meets quality and specification standards before authorising the release of the beer to the packaging stage.

(13) Beer is taken from the BBT using a sampling valve and tests are undertaken in a brewery satellite quality assurance laboratory. The main parameters tested are ABV, pH, colour, carbonation and haze. The ABV of the product is measured using an Anton Paar Alcolyzer machine.

(14) Only when the beer in a BBT is approved by one of the brewing shift managers can it be released to packaging. This may not occur immediately and the beer may remain in the BBT for a period depending on the packaging timetable, up to an absolute maximum of 4 days (the target period being under 48 hours).

(15) All equipment used by MCBC for product testing is serviced regularly and checked and calibrated daily using reference samples. The reference samples for ABV come from MCBC's central quality assurance laboratory, whose standards meet those of the United Kingdom Accreditation Service proficiency testing scheme to ensure that the results produced are accurate.

(16) Further quality control checks take place after packaging (see below).

Packaging

(17) The Burton Brewery has separate packaging lines for kegs and cans. There are no can packaging lines at Tadcaster Brewery (or, before it closed, at the Alton Brewery). Each BBT is connected to a packaging line by a dedicated beer pipe. Beer flows from the BBTs to the packaging line. New 'Promass' flow meters were fitted on to the keg packaging line and (for Burton only) can packaging line beer pipes. The installation dates were as follows:

Area	**Installation date**
Burton Keg	14/08/2012
Tadcaster Keg	21/08/2012
Alton Keg	28/08/2012
Burton Can Line 2	14/04/2013
Burton Can Line 4	06/08/2014

(18) MCBC installed these new Promass meters as part of its implementation of its new arrangements for accounting for duty which started in September 2012. Two Promass flow meters were installed on each packaging line. The meters are highly accurate and measure the volume of beer which passes the meter. Having two meters enables an average to be taken of the two readings in order to secure the most accurate volume measurement. Having two Promass meters also means that one of the meters can be removed to have its calibration checked by the manufacturer without disruption.

(19) The flow meters are linked to a Programmable Logic Controller ("PLC"), a piece of computer hardware used in industrial settings to control a manufacturing process. Each Promass flow meter sends a digital pulse to the PLC at regular intervals every time 0.1 barrels of beer passes the Promass flow meters. The PLC counts each pulse and accumulates a running tally of the volume of beer that has passed the meters. That running tally is read by the iFIX computer system (which, as noted above, is used to control the various valves, tanks and machines used during the brewing process, and which displays the measurements taken by various machines). This running tally is then automatically recorded at frequent intervals on a database known as "Historian".

In the case of beer destined for cans, Historian is programmed to "poll" iFIX every second for the running tally and to record this value in the database. In the case of beer destined for kegs, Historian is programmed to poll iFIX for the running tally and to record the value in the database when the running tally has moved on by 0.5 barrels.

Canning

(20) A stock- keeping unit ("SKU") is a particular size, package and type of beer (e.g. a Carling 440ml can is a type of SKU). MCBC's marketing, legal and other relevant departments approve the labelling design for each can SKU and MCBC's can suppliers are provided with the agreed designs and notified of any updates periodically.

(21) The information shown on the can includes the (nominal) ABV. When cans are delivered to the Burton Brewery they bear all requisite labelling (but do not have a lid, referred to as a can end, or a "unique identifier"). The cans are pre-labelled: at the time when beer is packaged into a can, the can is already labelled with the (nominal) ABV of the beer.

(22) MCBC's logistics team and packaging suppliers ensure that relevant packaging materials are available in the relevant packaging hall just in time for use.

(23) The cans are filled using beer from an Inlet Buffer Tank ("IBT") into which the beer flows after leaving the BBT. The IBT balances any variations in flows and pressure and ensures the filling machine is constantly fed with beer at the appropriate rate.

(24) After the cans are filled and sealed, they move through a "course level detector" to make sure that they are filled to the correct level. Subsequently, the cans are inverted to test that they have been sealed correctly prior to the pasteurisation process. Pasteurisation consists of heating the cans to a specified temperature for a short period by spraying heated water over the outside of the cans followed by progressive cooling back to ambient temperature. This process ensures that the product is microbiologically stable for the full shelf life of the product.

(25) A unique identifier is added to the base of each can as part of the packaging process. It includes a best before date, a Julian code (day of the year produced), a line code (identifying line produced on) and the time when the beer is packaged into the can. This is a quality standard requirement so that if there is a consumer complaint it is possible to trace that can back to the packaging line and the relevant date and time of packaging.

(26) Secondary packaging is also applied to cans, for example wrapping four cans together for a multi pack. Secondary packaging is produced by an external supplier to a set specification. The secondary packaging is pre-printed with the necessary labelling, including the nominal ABV, save for a unique identifier which is added during the secondary packaging process.

(27) Following the addition of any secondary packaging, the product is loaded on to pallets. Subject to quality control checks, the pallets are scanned (to update MCBC's SAP Stock Management System).

Kegging

(28) The beer destined for kegs is moved from a BBT to an IBT. When the beer leaves the IBT it is flash pasteurised by being moved through a plate heat exchanger before it reaches a Sterile Beer Tank ("SBT"). Due to the size and volume of a keg, it is not practical to pasteurise the beer whilst it is in the keg.

(29) In contrast to cans, the same keg will be used a number of times over several years. Customers will return kegs after use and when they arrive back at the Breweries they are cleaned in advance of filling. There are five sizes of kegs which are used. Any given keg may be used for various types of Molson Coors beers over the course of the keg's lifetime.

(30) The relevant filling machine for a keg is referred to as a keg racker, which is situated after the SBT. At the end of the filling process, the keg leaves the keg racker via conveyors to be weighed, labelled and a keg cap applied. A cap is applied to the extractor tube of the keg. This cap will include the name of the relevant beer the keg has been filled with. The keg is then weighed to check it is the required weight. Finally, the keg is labelled with a label printed contemporaneously to the filled keg arriving at the end of the packaging line (the keg labeller, an automated machine, is set to the relevant design at the start of each packaging run).

Further Quality Control

(31) The product is then spot-tested for the final time in a satellite quality assurance laboratory. Every hour, filled packages are spot-tested to check that the parameters tested in the BBT have not significantly changed (the ABV of the product is again tested using an Anton Paar Alcolyzer system). Any changes indicate contamination has taken place. Contamination might be due to the beer inadvertently being mixed with: other products; water used to move the product; and/or cleaning liquids. If a product differs significantly from the expected value or from defined parameters then packaging is stopped and the product is removed for further testing.

Distribution and Stock Management

(32) Burton Brewery: beer packaged in cans is moved from the relevant packaging area in the brewery to MCBC's National Distribution Centre ("NDC") where it is held as stock. Beer packaged in kegs is moved from the relevant packaging area to the Burton Brewery Warehouse where it is held as stock. Sometimes kegs are moved onward from the Burton Brewery Warehouse to the NDC. The Burton Brewery Warehouse and the NDC are adjacent to each other.

(33) Tadcaster and Alton brewery (before it closed): only beer packaged in kegs is produced at these breweries. At the Tadcaster brewery the kegs move

from the relevant packaging area to the Tadcaster Brewery Warehouse to be held as stock. Before the Alton brewery closed, beer packaged in kegs would move from the relevant packaging area to the Alton Brewery Warehouse where it was held as stock.

(34) Once a customer order has been received by phone or email etc, a purchase order will be generated, and stock in the relevant warehouse or the NDC is allocated to orders received. Orders are dispatched from the relevant warehouse or the NDC. When the order is delivered, a proof of delivery is generated and recorded on MCBC's SAP system. MCBC operates an overnight billing run where invoices are printed for each order that has been delivered (there must be proof of delivery).

MCBC's Duty Calculation Process

(35) MCBC calculates beer duty by reference to the actual ABV of the beer in the BBT. MCBC applies this method of calculating duty across its various brands of beer as follows: from September 2012 for Carling kegs, from January 2013 for Worthington kegs, from May 2013 for certain Carling cans and from December 2013 for Cobra kegs and Coors Light kegs.

(36) The total volume of beer in the BBT is taken as the average of the two totals recorded by the two flow meters, as shown in iFIX. A brewery worker views that total figure on a screen connected to the iFIX system and manually enters it into and logs it in Prism/Proficy, connected to the SAP system: this is done typically within 60 minutes of the last of the beer having flowed through the flow meters. This entry is made in the case of all beer. In the case of beer which has been brewed under one of the products codes for constructively removed beer it is used to calculate the duty payable.

(37) MCBC produces a consolidated beer duty return which covers all of the Breweries on a calendar monthly basis.

(38) For the purposes of the beer duty return, data is extracted from the SAP Excise Duty Module system. The information required for the return includes:

(a) the duty suspended receipts into a site (for example from other brewers);

(b) duty suspended dispatches from the site; and

(c) duty paid dispatches from the site. Corrections to earlier beer duty returns are also made if required.

(39) For the Tadcaster Brewery and, until it closed the Alton Brewery, data was extracted from MCBC's Prism system (which logs data captured in the relevant brewery). In the case of the Burton Brewery, data was also extracted from PRISM for a period until the system was replaced for this brewery. Since replacement, MCBC extracts the required data for the Burton Brewery from an enhanced version of SAP in operation at that brewery.

(40) In the period from September 2012 to date, for the purpose of producing the consolidated beer duty return, further data is also extracted and used in

relation to the beer at issue in this appeal. The extracted data includes the actual ABV of the beer in the BBT, as measured in the manner described above, and the volume of the beer which has passed the flow meters. MCBC has used the extracted data to calculate duty on the beer in issue for inclusion in the consolidated beer duty return.

Labelling Requirements

(41) Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling,–presentation and advertising of foodstuffs, Commission Directive 87/250/EEC on the indication of alcoholic strength by volume in the labelling of alcoholic beverages for sale to the ultimate consumer and the Food Labelling Regulations 1996 (SI 1996 No 1499) provided that an ABV tolerance of +0.5% or -0.5% applied to the labelling of beer with a strength between 1.2% and 5.5% ABV. The EU legislation was repealed and replaced with effect from 13 December 2014 by Regulation 1169/2011/EU on the provision of food information to consumers, implemented in the UK by the Food Information Regulations 2014 (SI 2014/1855). The +/- 0.5% ABV labelling tolerance has been retained (see Regulation 1169/2011/EU, Articles 1(3), 6, 28 and Annex XII, para 1; Food Information Regulations 2014, Article 12, Schedule 4 and Schedule 5, Part 2, Notes 21 and 49). None of those regulations require the ABV to be marked on the label of kegs.

Correspondence with HMRC

19. On 2 March 2012, as MCBC had the capability to record the actual ABV of the beer at a BBT (which was considered the earliest time at which brewery conditioned beer was fit for consumption) Mr Rutherford wrote to MCBC's then CRM at HMRC, to invite HMRC's comments on MCBC's proposal to pay beer duty based on the actual ABV rather than the declared ABV. A further copy of the letter was sent to the CRM by email on 4 April 2014 following his telephone request to do so on 2 April 2014, presumably having mislaid the original.

20. HMRC responded to MCBC's letter on 8 May 2012 referring to regulation 18 of the Beer Regulations 1993 (which is set out below). The letter noted that if the labels on the final container showed a higher ABV than that measured, the regulations required duty to be calculated using that greater amount notwithstanding that the label/invoice would come into existence after the duty point had been passed.

21. MCBC, in a detailed six page reply to HMRC, dated 18 June 2012, referred to the Beer Regulations 1993 and Council Directive 92/83/EEC which was implemented into UK domestic legislation by the Alcoholic Liquor Duties Act 1979. The letter continued and, after setting out the provisions of regulation 15A of the Beer Regulations (also set out below), stated:

> "The purpose of the constructive removal is to treat beer that has been constructively removed in the same way as beer that has been physically removed from a brewer's premises. This includes the requirement to account for duty on that beer. This is the essence of the

> constructive removal provisions and to deprive Regulation 15A of this effect would defeat the purpose of the constructive removal provisions entirely.
>
> Regulation 15A(5) also makes it absolutely clear that once beer has been constructively removed any records in relation to that beer cannot be changed or altered. To suggest that following the constructive removal the ABV used for the purpose of beer duty must be reviewed again and again, is not only highly impractical but is also wholly inconsistent with Regulation 15A(5) and also HMRC's guidance"

After setting out HMRC's guidance, including that at paragraph 7.5 of the Notice 226, to which we have referred at paragraph 3, above, and the decision of the Court of Appeal in *Carlsberg UK Ltd v HMRC* [2012] STC 1140 (see below), the letter concluded:

> "On the basis of the above and provided our accounting records include all of the information necessary in relation [to] the beer at the time of constructive removal (ie actual ABV, volume, time and date of constructive removal), we would appreciate of you could confirm that the requirements of Regulation 15A(2) are satisfied."

22. However, HMRC in a letter to MCBC dated 8 August 2012 made it clear that their view had not changed from that expressed in their letter of 8 May 2012, namely that duty was to be calculated on the basis of ABV stated on labels, packaging, invoices etc. rather than the actual ABV recorded at the time of constructive removal.

23. Further correspondence between the parties did not take the matter further and on 22 August 2012 MCBC wrote to notify HMRC that as:

> "MCBC will be in a position to commence accounting for duty based on actual ABV from September and in the absence of any reasoned rationale as to why it cannot do so, will proceed on this basis."

24. As stated in its letter to HMRC, MCBC calculated its liability to duty using the actual ABV from September 2012. Although the letter of 22 August 2012 was sent by MCBC to HMRC, for some reason either it got lost in the post or went astray in HMRC's internal mail system, it did not find its way to HMRC's file and was not seen by Mr Bell or Mrs Winfield.

25. In late July 2014 Mrs Winfield telephoned the Tax Manager of MCBC to arrange a visit to the Burton brewery for 6 August 2014 as part of a three year risk review. Mrs Winfield explained that the purpose of the visit was to enable her and her colleague, who was to accompany her on the visit, to look at MCBC's stock control, Fill levels, Excise Movement and Control System and ABVs and meetings were arranged with all relevant contacts at MCBC except in relation to ABVs. The visit took place, as arranged, on 6 August 2014 where it became apparent to Mrs Winfield that MCBC was calculating its liability to excise duty based on the actual ABV of the beer at the BBT.

26. Following the visit Mrs Winfield examined HMRC's files and although correspondence between HMRC and MCBC was included there was no record of

HMRC having received the letter from MCBC, dated 22 August 2012, to which we have referred in paragraph 23, above.

27. On 7 October 2014 HMRC issued an assessment in the sum of £40,911,423 in respect of the period from 1 September 2012 to 31 August 2014:

> "… due to a breach of Regulation 18 of the Beer Duty Regulations 1993.
>
> This assessment is as a result of the incorrect alcoholic strength being used to calculate beer duty and the duty underpaid is itemised on the attached spreadsheet."

28. On 5 November 2014 MCBC requested a review of that assessment on the basis that the duty point was:

> "… when the beer is removed from the [BBT]. In accordance with Regulation 15A MCBC constructively removes the beer from duty suspense by making an entry in its accounting records to that effect."

However, the letter did not specify the accounting records to which it referred.

29. The assessment was upheld on 18 December 2014 following a review and on 13 January 2015 MCBC notified its appeal against the assessment to the Tribunal.

30. A meeting between MCBC and HMRC took place at MCBC's Burton brewery on 12 February 2015 attended by, amongst others, Mr Rutherford, Mr Ball and Mrs Winfield to discuss the ABV issues that had resulted in the issue of the £40.9m assessment on 7 October 2014. In his note of the meeting Mr Ball recorded that he had explained that:

> "HMRC had not been aware that MCBC were accounting for excise duty on beer based on the actual ABV in Bright Beer Tank (BBT) until [Mrs Winfield and another officer] visited the brewery as part of a 3 year low risk review in August 2014. He [Mr Ball] has spoken to [the retired HMRC CRM) who had confirmed that he was not aware of this either.
>
> [Philip Rutherford] said he was staggered that the [retired CRM] had said he didn't know about this. He [Mr Rutherford] said he had made it clear [to the CRM] on a number of occasions and requested HMRC to review the process several times. HMRC advised that they had no records of any calls or references on this."

31. However, in evidence Mr Ball accepted that MCBC had informed HMRC that it was intended to calculate beer duty by reference to the actual ABV and that the note was wrong. He said that it should have stated that HMRC were not aware that MCBC had started to calculate its liability to beer duty in this way as he had not seen the letter of 18 August 2012 from MCBC. Mrs Winfield also accepted that the note did not accurately reflect what was said at that meeting.

32. A further assessment, in respect of the period between 1 September 2014 to 31 January 2015, in the sum of £10,417,345 was issued by HMRC on 27 February 2015.

33. MCBC notified its appeal against this assessment to the Tribunal on 25 March 2015. By directions issued by the Tribunal on 13 July 2015 the second appeal was consolidated with first and HMRC were required to produce a combined Statement of Case addressing both appeals.

Further findings of fact

34. In relation to constructive removal of beer, and notwithstanding the descriptions of this in correspondence and Mr Rutherford's initial witness statements, we find that the process was as stated by Mr Rutherford in his final witness statement and explained in evidence and adopt the following summary of the process taken from Mr Grodzinski's skeleton argument:

> (1) Initially, a "packaging process order" or a "packaging schedule" is generated within MCBC's computer systems (known as the SAP and PRISM systems respectively), as a result of a decision having been taken to produce a quantity of beer to meet anticipated customer demand for a particular beer product (e.g. Carling cans).
>
> (2) At this stage, the anticipated beer production is not precisely matched to a particular customer order, and the precise volume of beer that will become subject to duty has not yet been measured.
>
> (3) The packaging process order/schedule will however identify the particular beer product (e.g. Carling cans) and whether that beer is to be constructively removed before packaging, or whether it is to remain in duty suspense when it is sold to the customer.
>
> (4) As noted above, once the relevant tests have been carried out on the beer in the BBT, the beer will flow out of the BBT, through pipes to the IBT, passing the "Promass" flow meters as it does so.
>
> (5) Every time 0.1 barrels of beer passes the flow meters, a digital pulse is sent to a Programmable Logic Controller ("PLC"). The PLC counts each such pulse, and accumulates a running total of the volume of beer that has passed the meters.
>
> (6) That running total is read by the "iFix" computer software application (which is used to control the various valves, tanks and machines used during the brewing process, and which displays the measurements taken by various machines).
>
> (7) This running total is then automatically recorded at frequent intervals on a database known as "Historian". In the case of beer destined for cans, Historian is programmed to "poll" iFIX every second for the running total and to record this value in the database. In the case of beer destined for kegs, Historian is programmed to poll iFIX for the running total and to record the value in the database when the running total has moved on by 0.5 barrels.
>
> (8) Entries in Historian are made for all beer products – ie different brands of beer, beer that is destined for cans as well as kegs, and beer that will be constructively removed as well as beer which will remain in duty suspense.

Further, different categories of beer will be given different product codes, which are also recorded in the Historian database. Therefore, beer which is to be constructively removed will have a different product code to beer which is to remain under duty suspense.

(9) The Historian data entries recording the volume of beer that has passed the flow meter, which are associated with a duty paid product code, constitute the constructive removal records.

(10) At the time these Historian records are made, the beer will not yet be in the labelled cans or kegs.

(11) In addition to the Historian entries, the final volume of beer that has left the BBT and which has already been constructively removed, is logged in the SAP/PRISM system (ie after a packaging process order/schedule has been completed) and is used to calculate the duty payable on the beer that has already been constructively removed.

(12) But such later entry in the SAP system does not constitute the constructive removal record itself, that record already having been made in Historian: see (viii) above.

35. We should also add that we find that the change, from September 2012, by MCBC in its calculation of duty by reference to the actual ABV of the beer brewed, rather than the ABV stated on the label was to reduce its cost base and prevent its customers, who were not aware of the reduction in ABV from, as Mr Rutherford put it, demanding "a slice" of the cost saving. However, we note that this did not contravene the statutory labelling requirements (see above) which provide for a +/- 0.5% ABV labelling tolerance and that MCBC was careful not to alienate consumers who, taste tests indicated, preferred the beer with the lower ABV.

36. Additionally, we find that at the time the brewery worker views the total volume of beer in the BBT on the screen connected to the iFIX system and enters it manually into Prism/Proficy as described in paragraph 18(36) above, the beer involved would, as Mr Rutherford confirmed in evidence, have been packaged into cans or kegs that had been pre-labelled with a greater ABV than that on which the duty was calculated in accordance with the packaging schedule agreed the previous week.

Relevant Legislation

United Kingdom Legislation

37. We set out the relevant provisions of the United Kingdom legislation in force at the time of the assessments, insofar as they are material to the present case.

38. The Finance Act 1994 ("FA 1994"):

> **12.— Assessments to excise duty**
>
> (1) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that there has been a default falling within subsection (2) below,

the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.

16.— Appeals to a tribunal

…

(6) On an appeal under this section … it shall … be for the appellant to show that the grounds on which any such appeal is brought have been established.

39. The Alcoholic Liquor Duties Act 1979 ("ALDA"):

1.— The alcoholic liquors dutiable under this Act

(1) Subsections (2) to (8) below define for the purposes of this Act the alcoholic liquors which are subject to excise duty under this Act, that is to say—

…

(b) beer,

and in this Act "dutiable alcoholic liquor" means any of those liquors and "duty" means excise duty.

…

(3) "Beer" includes ale, porter, stout and any other description of beer, and any liquor which is made or sold as a description of beer or as a substitute for beer and which is of a strength exceeding 0.5 per cent …

2.— Ascertainment of strength volume and weight of alcoholic liquors.

(1) …

(2) For all purposes of this Act—

(a) except where some other measure of quantity is specified, any computation of the quantity of any liquor or of the alcohol contained in any liquor shall be made in terms of the volume of the liquor or alcohol, as the case may be;

(b) any computation of the volume of any liquor or of the alcohol contained in any liquor shall be made in litres as at 20°C; and

(c) the alcoholic strength of any liquor is the ratio of the volume of the alcohol contained in the liquor to the volume of the liquor (inclusive of the alcohol contained in it);

and in this Act, unless the context otherwise requires—

"alcohol" means ethyl alcohol; and

"strength" in relation to any liquor, means its alcoholic strength computed in accordance with this section, the ratio referred to in paragraph (c) above being expressed as a percentage.

(3) HMRC may make regulations prescribing the means to be used for ascertaining for any purpose the strength, weight or volume of any liquor, and any such regulations may provide that in computing for any purpose the strength of any liquor any substance contained therein which is not alcohol or distilled water may be treated as if it were.

(3A) Without prejudice to the generality of subsection (3) above, regulations under that subsection may provide that for the purpose of charging duty on any spirits, beer, cider, wine or made-wine contained in any bottle or other container, the strength, weight or volume of the liquor in that bottle or other container may be ascertained by reference to any information given on the bottle or other container by means of a label or otherwise or to any documents relating to the bottle or other container.

(4) Different regulations may be made under subsection (3) above for different purposes.

(5) Nothing in this section shall prevent the strength, weight or volume of beer, wine, made-wine or cider from being computed for the purpose of charging duty thereon by methods other than that provided in this section.

…

36.— General beer duty

(1) There shall be charged on beer—

(a) imported into the United Kingdom, or

(b) produced in the United Kingdom,

a duty of excise at the rates specified in subsection (1AA) below.

(1ZAA) The duty charged by subsection (1) is referred to in this Act as "general beer duty".

(1AA) The rates at which general beer duty shall be charged are—

…

(a) in the case of beer that is of a strength which exceeds 2.8 per cent and is not small brewery beer, [£*x*] per hectolitre per cent of alcohol in the beer;

…

(2) Subject to the provisions of this Act—

(a) general beer duty on beer produced in, or imported into, the United Kingdom shall be charged and paid, and

(b) the amount chargeable in respect of any such duty shall be determined and become due,

in accordance with regulations under section 49 below and with any regulations under section 1 of the Finance (No. 2) Act 1992.

…

41A.— Suspension of duty: registration of persons and premises

(1) A person registered by the Commissioners under this section may hold, on premises so registered in relation to him, any beer of a prescribed class or description—

(a) which has been produced in, or imported into, the United Kingdom, and

(b) which is chargeable as such with excise duty,

without payment of that duty.

(2) A person entitled under subsection (1) above to hold beer on premises without payment of duty may also without payment of duty carry out on those premises such operations as may be prescribed on, or in relation to, such of the beer as may be prescribed.

(3) No person shall be registered under this section unless—

(a) he is a registered brewer or a packager of beer;

(b) he appears to the Commissioners to satisfy such requirements for registration as they may think fit to impose.

(4) No premises shall be registered under this section unless—

(a) they are used for the production or packaging of beer, or

(b) they are adjacent to, and occupied by the same person as, premises falling within paragraph (a) above which are registered under this section, and they appear to the Commissioners to satisfy such requirements for registration as the Commissioners may think fit to impose.

…

(7) As respects beer chargeable with a duty of excise that has not been paid, regulations under section 49 below may, without prejudice to the generality of that section, make provision—

(a) regulating the holding or packaging of, or the carrying out of other operations on or in relation to, any such beer on registered premises without payment of the duty;

(b) for securing and collecting the duty on any such beer held on registered premises;

(c) permitting the removal of any such beer from registered premises without payment of duty in such circumstances and subject to such conditions as may be prescribed;

…

47.— Registration of producers of beer.

(1) A person who produces beer on any premises in the United Kingdom must be registered with the Commissioners under this section in respect of those premises; and in this Act "registered brewer" means a person registered under this section in respect of any premises.

…

49.— Beer regulations.

(1) The Commissioners may, with a view to managing, securing and collecting general beer duty or high strength beer duty on beer produced in, or imported into, the United Kingdom or to the protection of the revenues derived from any duty of excise on beer, make regulations—

(a) regulating the production, packaging, keeping and storage of beer produced in the United Kingdom and the packaging, keeping and storage of beer imported into the United Kingdom;

(b) regulating the registration of persons and premises under section 41A or 47 above and the revocation or variation of any such registrations;

(c) for determining under or in accordance with the regulations when the production of beer begins and when it is completed;

(d) for securing and collecting the duty;

(e) for determining the duty and the rate thereof and, in that connection, prescribing the method of charging the duty;

(f) for charging the duty, in such circumstances as may be prescribed in the regulations, by reference to a strength which the beer might reasonably be expected to have, or the rate of duty in force, at a time other than that at which the beer becomes chargeable;

(g) for relieving beer from the duty in such circumstances and to such extent as may be prescribed in the regulations;

(h) regulating and, in such circumstances as may be prescribed in the regulations, prohibiting the addition of substances to, the mixing of, or the carrying out of other operations on or in relation to, beer;

(j) regulating the transportation of beer in such circumstances as may be prescribed in the regulations.

…

(2) Regulations under this section may make different provision for persons, premises or beer of different classes or descriptions, for different circumstances and for different cases.

(3) Where any person contravenes or fails to comply with any regulation made under this section, his contravention or failure to comply shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties), and any article or substance in respect of which any person contravenes or fails to comply with any such regulation shall be liable to forfeiture.

40. The principal relevant regulations in respect of beer duty are the Beer Regulations 1993 (the "Beer Regulations"). Insofar as material to the present case these provide:

Part III

PRODUCTION

8.— When the production of beer begins and when it is completed

(1) For the purposes of section 47 of the Act (registration of producers of beer) and these Regulations, the production of beer begins when the mash is made.

(2) For the purposes of section 36 of the Act (the charge of excise duty) and these Regulations, beer shall be deemed to have been produced at the time determined in accordance with any direction given by HMRC or in the absence of any such direction at the earlier of–

(a) the time when the beer is put into any package;

(b) the time when the beer is removed from the brewery;

(c) the time when the beer is consumed;

(d) the time when the beer is lost;

(e) the time when the beer reaches that state of maturity at which it is fit for consumption.

(3) In this regulation "beer" includes unfinished beer

Part IV

SUSPENSION OF DUTY

Registration of persons and premises

9.— Application for registration for duty suspension

(1) Every application by a packager of beer or a brewer ("the applicant") to be registered under section 41A of the Act in relation to any premises shall be made to the Commissioners.

(2) A separate application shall be made in respect of each of the premises on which the applicant intends to hold beer without payment of the duty.

10.— Registration for duty suspension

(1) The Commissioners may register the applicant in respect of each of the premises in respect of which application is made, and may issue a separate registered holder certificate in respect of each of those premises.

…

Part V

SUSPENSION OF DUTY

Arrangements and requirements

12.— Holding beer in duty suspension

A registered holder may hold, on registered premises without payment of duty, beer of any class or description specified in the registered holder certificate issued in respect of those premises; provided that the duty chargeable in respect of beer of that class or description is secured by an approved guarantee except where the Commissioners may otherwise agree.

…

Part VI

DETERMINATION OF THE DUTY

15A.— Constructive removal

(1) Where beer is held on any registered premises to which this regulation applies it shall be deemed to have left those premises at the time of its constructive removal or, if earlier, the time it actually left them.

(2) This regulation applies to registered premises where the records relating to removal are kept by means approved for this purpose by the Commissioners; and the Commissioners may at any time revoke such approval upon giving fourteen days' notice in writing.

(3) The registered holder from whose registered premises constructive removal may take place shall keep such records as may be specified in a notice published by the Commissioners and not withdrawn by a further notice.

(4) Constructive removal shall mean the making of an entry in the records specified in accordance with paragraph (3) above which identifies the beer that is the subject of that entry as having left the registered premises (so that duty ceases to be suspended) notwithstanding that it remains on those premises.

(5) An entry showing the constructive removal of any beer shall not be cancelled, amended or altered.

16.— Rate of duty

The duty shall be paid at the rate in force at the duty point.

17.— The amount of beer in any container

(1) Except in the case of beer to which paragraph (2) below applies, the amount of beer in any container shall be deemed to be the greater of–

(a) the amount determined in accordance with section 2 of the Act;

(b) the amount ascertained by reference to information on the label of the container of the beer; and

(c) the amount ascertained by reference to information on any invoice, delivery note or similar document issued in relation to the beer.

18.— The strength of the beer

Save as the Commissioners otherwise allow, the strength of the beer shall be deemed to be the greater of–

(a) the strength determined by the method described in Schedule 4 to these Regulations;

(b) the strength ascertained by reference to information on the label of the container of the beer;

(c) the strength ascertained by reference to information on any invoice, delivery note or similar document issued in relation to the beer; and

(d) the strength which any cask or bottle conditioned beer or any other unfinished beer is reasonably expected to have when sold by way of retail or otherwise supplied for consumption.

Part VII

PAYMENT OF THE DUTY AND RETURNS

20.— Time and method of payment

(1) Subject to paragraph (2) and save as HMRC may allow, the duty shall be paid at the duty point.

(2) Where the person liable to pay the duty is a registered brewer or registered holder, save as HMRC otherwise direct, the duty shall be paid not later than the 25th day of the month next following the month containing the duty point in relation to the duty …

21.— Furnishing of returns

(1) Save, in the case of a registered holder, as HMRC may otherwise direct, every person who is registered or was or is required to be registered in accordance with these Regulations shall, in respect of every period of a month furnish HMRC, not later than the 15th day of the month next following the end of the period to which it relates, with a return on a form approved by HMRC showing the amount of duty payable by him and containing full information in respect of the other matters specified in the form and a declaration signed by him that the return is true and complete.

…

Part VIII

OPERATIONS ON BEER

…

25.— Protection of the revenue derived from excise duty on beer

Unless and until the beer is sold by way of retail or otherwise supplied for consumption, after the duty point no person may carry out any operation on, or in relation to, beer of any description if that operation would, had it been carried out before the duty point, have resulted in a greater amount of duty being payable than was actually payable at the duty point."

41. The Notice published by HMRC under regulation 15A(3) is Excise Notice 226: Beer Duty (the "Beer Notice"). The applicable part of paragraph 7.5 of the Beer Notice ("paragraph 7.5") provides:

> **The following requirements have the force of law and are made under regulation 15A(3) of the Beer Regulations 1993**
>
> You must record:
>
> - the date of any change of status of any beer from duty suspended to duty paid, and
> - the product(s).

42. Finance (No. 2) Act 1992:

> **1.— Powers to fix excise duty point.**
>
> (1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ("the excise duty point").
>
> (2) Where regulations under this section fix an excise duty point for any goods, the rate of duty for the time being in force at that point shall be the rate used for determining the amount of duty to be paid in pursuance of the requirement that takes effect at that point.
>
> (3) Regulations under this section may provide for the excise duty point for any goods to be such of the following times as may be prescribed in relation to the circumstances of the case, that is to say—
>
> (a) the time when the goods become chargeable with the duty in question;
>
> (b) the time when there is a contravention of any prescribed requirements relating to any suspension arrangements applying to the goods;
>
> (c) the time when the duty on the goods ceases, in the prescribed manner, to be suspended in accordance with any such arrangements;

(d) the time when there is a contravention of any prescribed condition subject to which any relief has been conferred in relation to the goods;

(e) such time after the time which, in accordance with regulations made by virtue of any of the preceding paragraphs, would otherwise be the excise duty point for those goods as may be prescribed;

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

…

43. Provisions relating to the excise duty point and the payment of the duty are now contained in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("HMDP Regulations"). Interpretive provisions are contained in regulation 3 of the HMDP Regulations which includes the definition of "tax warehouse" as (a) in relation to a place situated in the United Kingdom) – (i) an excise warehouse and (ii) any premises registered under s 41A or 47 ALDA.

44. Part 2 of the HMDP Regulations concerns goods released for consumption in the United Kingdom. The following regulations are relevant for the purposes of the present case:

3.—

(1) In these Regulations—

…

"business day" means any day except—

(a) Saturday, Sunday, Good Friday or Christmas Day;

(b) a bank holiday under the Banking and Financial Dealings Act 1971;

(c) a day appointed by Royal proclamation as a public fast or thanksgiving day;

(d) a declared by an order under section 2 of the Banking and Financial Dealings Act 1971 to be a non-business day;

…

"tax warehouse" means—

(a) …

(i)

(ii) any premises registered under section 41A or 47 ALDA 1979;

…

5.—

Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.

6.—

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

(a) leave a duty suspension arrangement;

…

7.—

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

(a) they leave any tax warehouse in the United Kingdom or are otherwise made available for consumption (including consumption in a tax warehouse) unless—

…

…

European Union legislation

45. The principal EU Directive harmonising the conditions for charging excise duty on excise goods (ie the goods formerly covered by Directive 92/12/EEC) is now Council Directive 2008/118/EC of 16 December 2008 ("Directive 2008/118/EC") which sets out the general arrangements for excise duty and repeals Directive 92/12/EEC ("Directive 2008/118/EC"). "Excise goods" includes alcohol and alcoholic beverages covered by Directives 92/83/EEC and 92/84/EEC.

46. Directive 2008/118/EC provides:

Whereas

…

(2) Conditions for charging excise duty on the goods covered by Directive 92/12/EEC, hereinafter 'excise goods', need to remain harmonised in order to ensure the proper functioning of the internal market.

…

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

Article 1

1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter 'excise goods'):

…

(b) alcohol and alcoholic beverages covered by Directives 92/83/EEC and 92/84/EEC;

…

Article 2

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.

…

Article 7

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

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

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

(b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;

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

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

…

Article 8

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

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

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

from the tax warehouse, any other person involved in that departure;

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

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

…

Article 9

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

Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States.

47. Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages provides:

…

Whereas it is important to the proper functioning of the internal market to determine common definitions for all the products concerned;

…

Whereas, in the case of beer, it is possible to permit alternative methods of calculating the duty on the finished product;

…

Article 1

1. Member States shall apply an excise duty to beer in accordance with this Directive.

2. Member States shall fix their rates in accordance with Directive 92/84/EEC.

Article 2

For the purposes of this Directive, the term ‘beer’ covers any product falling within CN code 2203 or any product containing a mixture of

beer with non-alcoholic drinks falling within CN code 2206, in either case with an actual alcoholic strength by volume exceeding 0,5 % vol.

Article 3

1. The excise duty levied by Member States on beer shall be fixed by reference either:

— to the number of hectolitre/degrees Plato, or

— to the number of hectolitre/degrees of actual alcoholic strength by volume

of finished product.

2. In assessing the charge to duty on beer in accordance with the requirements of Directive 92/84/EEC, Member States may ignore fractions of a degree Plato or degree of actual alcoholic strength by volume.

…

48. Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages ("the Rates Directive") provides:

…

Whereas the methods of taxing beer within the Member States vary, and it is possible to permit this variation to continue, in particular by laying down a minimum rate expressed as a charge related both to the original gravity and to the alcoholic content of the product;

Article 1

Not later than 1 January 1993, Member States shall apply minimum rates of excise duty in accordance with the rules laid down in this Directive.

Article 2

The products covered by this Directive are:

…

—— beer,

as defined in Directive 92/83/EEC.

Article 6

As from 1 January 1993, the minimum rate of excise duty on beer shall be fixed:

— ECU 0,748 per hectolitre/degree Plato, or

— ECU 1,87 per hectolitre/degree of alcohol of finished product.

Discussion and Conclusion

49. It is common ground that MCBC and its breweries are registered with HMRC under ss 41A and 47 ALDA and regulations 9 and 10 of the Beer Regulations. Accordingly, each of its premises is a "tax warehouse" for the purposes of HMDP. As the Statement of Agreed Facts records, these registrations cover the production of beer, the holding of beer in suspension and the classes of beer which may be held. It is also accepted that it is for MCBC to establish, as a matter of fact, that it meets the constructive removal criteria set out in regulation 15A of the Beer Regulations and paragraph 7.5 of the Beer Notice (see above).

50. For MCBC, Mr Grodzinski contends that the records kept by MCBC meet the constructive removal criteria of regulation 15A of the Beer Regulations and paragraph 7.5 and therefore the duty point arises, in accordance with s 1 Finance (No 2) Act 1992 and regulations 5 to 7 of the HMDP Regulations, at the time of constructive removal as the rate of duty in force, the volume of the beer and its strength (ABV), can be ascertained (in accordance with regulations 16, 17 and 18, respectively, of the Beer Regulations). As this arises before packaging the only means to determine the strength of the beer under regulation 18 of the Beer Regulations is under regulation 18(a) which provides for determining the actual strength of the beer. Such an approach, Mr Grodzinski says, is not only in accordance with domestic provisions but also entirely consistent with, and indeed demanded by EU law.

51. Mr Macnab, for HMRC, contends that, however construed, the basic recording requirements of regulation 15A of the Beer Regulations and paragraph 7.5 have not been satisfied and that MCBC has not therefore established its case on the facts. In any event, he submits that, as a matter of law, the time of constructive removal is midnight on any day entered into the records specified under regulation 15A of the Beer Regulations. By such time as the beer would have been packaged in cans or kegs its strength is to be determined by reference to the labels on the packaging in accordance with regulation 18 of the Beer Regulations. This argument was referred to by the parties as the "day-by-day" point and we shall do the same.

52. Alternatively, Mr Macnab submits that if constructive removal did occur at the time the beer passed from the BBT, for duty purposes, its strength should still be ascertained by reference to the ABV stated on the packaging in accordance with regulation 18(b) and (c) of the Beer Regulations which have no temporal limit on their application. Mr Macnab relies on regulation 25 of the Beer Regulations in support of the construction he seeks to advance which, he says, is fully compliant with EU law and to illustrate difficulties with that advanced by MCBC, Mr Macnab refers to the drawback provisions, Excise Goods (Drawback) Regulations 1995, and HMRC's guidance, Notice 207, 'Excise Duty: drawback', in relation to the drawback of beer duty.

Issues

53. The following issues therefore arise:

> (1) what is the record required to establish constructive removal under regulation 15A of the Beer Regulations and paragraph 7.5;

(2) whether the records on which MCBC relies satisfy this requirement, ie has it established its case on the facts;

(3) whether, under the relevant statutory provisions, constructive removal can only take place on a day-by-day basis;

(4) whether there is a temporal limit on the application of regulation 18(b) and (c) of the Beer Regulations;

(5) whether regulation 25 of the Beer Regulations supports HMRC's construction of the Regulations;

(6) the effect of the drawback provisions; and

(7) whether MCBC's or HMRC's interpretation of the regulations is consistent with EU law.

54. We consider each in turn. In doing so, although carefully considered, it has not been necessary to mention every argument advanced on behalf of the parties.

Record required for constructive removal

55. Mr Macnab submits that the necessary record for the purposes of regulation 15A of the Beer Regulations and paragraph 7.5 has to be consciously and deliberately established in advance of any constructive removal so that it can be clearly identified. He contrasts this with what he describes as the reverse engineering of voluminous data held by MCBC (and provided to HMRC and the Tribunal) which was only identified as the relevant record some four years after constructive removal is said to have commenced. These records, he says, do not purport to record what is required by regulation 15A(3) and paragraph 7.5.

56. However, as Mr Grodzinski submits, both regulation 15A and paragraph 7.5 are silent as to the nature and form of the records required and clearly do not provide for a dedicated or bespoke record. It is merely stated that "the date of any change of status of any beer from duty suspended to duty paid" must be recorded. Additionally, regulation 15A(4) provides that the record must identify the beer that has been constructively removed and regulation 15A(5) that the record "shall not be cancelled, amended or altered".

57. We also agree with Mr Grodzinski that constructive removal is a concept or process designed to be of potential benefit to taxpayers which should not be construed restrictively. That this is the case is apparent from paragraph 7.5 of the Beer Notice which we have quoted at paragraph 3, above, and HMRC's Beer Manual which states (at BEER6020):

> "The Status of beer held on registered premises may be changed from duty suspended to duty paid without the need to remove the beer from those premises, providing that the appropriate duty is accounted for and a clear audit trail is maintained which identifies that beer in the trader's records. When a brewer constructively removes beer, particularly before a budget increase, the record must be completed before the time of the duty rate rise, and cannot subsequently be

> cancelled amended or altered. This is provided for by section [sic] 15A of the Beer Regulations 1993."

58. Therefore, as regulation 15A of the Beer Regulations and paragraph 7.5 provide that the records to be kept for constructive removal must state the date of any change of status of any beer from duty suspended to duty paid and nothing further, provided such a record exists, which in our view need not be specifically created for this purpose, we consider that the statutory conditions will be satisfied.

Whether MCBC's records satisfy the constructive removal requirement

59. Before considering whether the records kept by MCBC are sufficient to satisfy the constructive removal requirement it is first necessary to refer to Mr Macnab's criticism of the failure by MCBC to set out its case that the Historian database provides the record for the constructive removal of beer until Mr Rutherford's third witness statement in November 2016, which he reminds us, is some four years after MCBC began accounting for duty on the basis of the actual ABV and two years since the original assessment.

60. Mr Macnab says that this goes to the burden of proof and that MCBC's various attempts to identify the point of constructive removal and the entries in the records required by regulation 15A and paragraph 7.5 has been inconsistent and unconvincing and is an attempt by MCBC to build a case after the event based on records held in its computer database which, although genuine, were never intended or seen as record of constructive removal.

61. However, Mr Grodzinski contends that this should not undermine MCBC's factual case. He points out that, despite express requests from MCBC (eg the letter of 2 March 2012), HMRC did not offer any view on the adequacy of the constructive removal records neither did they take up the opportunities offered to inspect the systems and records. Also, there was no reference to the issue of adequacy of records in the review letter of 18 December 2014 which upheld the first assessment. He reminds us that this assessment was issued after Mrs Winfield had visited the brewery and held meetings with MCBC personnel there. Mr Grodzinski also, correctly, noted that the issue was not mentioned in the combined Statement of Case filed and served by HMRC on 9 September 2015 from which it was considered that the issue between the parties was one of law not fact.

62. In the circumstances, as the adequacy or otherwise of the constructive removal records did not appear to be in issue, it is perhaps not surprising that Mr Rutherford did not fully address the matter until his third witness statement and when giving evidence and we agree with Mr Grodzinski, that this does not undermine MCBC's factual case.

63. We now turn to the adequacy or otherwise of MCBC's records.

64. In view of our conclusion in relation to the statutory requirements for constructive removal records, Mr Macnab's argument that there is no evidence that the Historian database is or purports to be a specific, dedicated or definitive record for

the purposes of regulation 15A and paragraph 7.5 cannot succeed. However, he also contends that in any event the information recorded in the Historian database is largely incomprehensible in itself as it does not record discrete quantities of beer passing through the flow meters, but records the cumulative volume of beer as it passes from the BBT to the packaging lines with the final total volume of beer in the BBT after the packaging run is completed. Accordingly, he submits that the information in Historian cannot qualify as a relevant record for the purpose of constructive removal provisions.

65. However, although we have found (at paragraph 36, above) that at the time the brewery worker views the total volume of beer in the BBT on the screen connected to the iFIX system and enters it manually into Prism/Proficy, the beer would have been packaged into cans or kegs, we have also found (at paragraph 34, above) that records contained in the Historian database were generated contemporaneously via the PLC and iFIX system as the beer was emptied from the BBT and before it was packaged.

66. Accordingly, as the Historian database provides an accurate and contemporaneous record of beer passing through the flow meters, the accuracy of which is not disputed; the records indicate the category of beer and from its product code whether it is destined to be duty paid or duty suspended; and there is no suggestion that the records have been cancelled, amended or altered, we find that the Historian database satisfies the statutory record keeping requirements for constructive removal and that, as a matter of fact and in accordance with article 15A(4) of the Beer Regulations, constructive removal took place when the record in the Historian database was made.

Day-by day basis

67. Notwithstanding our conclusion that, as a matter of fact, constructive removal took place when the record was made in the Historian database, Mr Macnab contends that, as a matter of law, regulation 15A of the Beer Regulations and paragraph 7.5, which refers to the "date of any change of status of any beer" permits constructive removal from registered premises to be on a daily basis only and prohibits the application of any other basis, such as the time of day or stage of production.

68. The reference to "the date" in paragraph 7.5, he says, can only refer to a specific day and any constructive removals recorded as having taken place on a given date must have been effected at the end of that date, at midnight on the day in question at which time the beer had been packaged. Therefore, by virtue of regulation 18(b) of the Beer Regulations the duty is to be calculated by reference to the ABV stated on the labels.

69. Such a construction of paragraph 7.5 is, Mr Macnab submits, consistent with regulation 16 of the Beer Regulations (which provides for duty to be paid at the rate in force at the duty point which applies on a day-by-day basis) and the purpose of the provision, as is apparent from the extract from HMRC's Beer Manual we have quoted at paragraph 57 above, is to bring forward and crystallise the liability to duty in advance of a budget and not to introduce an opportunity for tax avoidance or unequal

treatment and distortion of competition or to gain a competitive advantage over other brewers as MCBC has sought to do in this case. To illustrate this point Mr Macnab took us to the, albeit factually distinguishable, decision of the Upper Tribunal (Henderson J and Judge Herrington) in *B & M Retail Ltd v HMRC* [2016] STC 2456 where, after considering submissions in relation to EU law, the Upper Tribunal observed, at [115]:

> "We accept that the ECJ's reasoning here supports the purpose behind both the 1992 Directive and the 2008 Directive, namely that it is the duty of national authorities to ensure that excise duty is levied and paid where goods in respect of which duty has not been paid are found to be circulating within the EU. Otherwise, there will be a distortion of the internal market if goods in respect of which duty has not been paid are circulating freely alongside goods where duty has been paid. On that basis, in *Gross* the purpose of the directive was served by assessing Mr Gross to the outstanding duty as he had clearly…."

And again 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 Mr Beal [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. That cannot be the intention behind the 2008 Directive and its predecessor."

70. To support his argument that paragraph 7.5 applies on a day-by-day basis, Mr Macnab relies on s 4 of the Interpretation Act 1978 in relation to the time of commencement of an Act. This provides:

> **4. Time of Commencement**
>
> An Act or provision of an Act comes into force—
>
> (a) where provision is made for it to come into force on a particular day, at the beginning of that day;
>
> (b) where no provision is made for its coming into force, at the beginning of the day on which the Act receives the Royal Assent.

71. Mr Macnab also relies on the common law rule recorded in volume 97 of Halsbury's Laws (2015) at paragraph 345 that "in computing a period of time counted in years or months fractions of a day" are:

> "… generally disregarded, so that the period is regarded as complete even though it is short to the extent of a fraction of a day"

We note that paragraph 346 of Halsbury's states:

> "**Priorities as between events happening on the same day**. The general rule that fractions of a day are to be disregarded does not apply where the object of a statute would be defeated unless the precise hour of an occurrence were noted, or where conflicting claims depend on the question of which of two events was first in order of time, for such cases the particular hour when the events occurred may become material."

72. However, we do not consider that either the Interpretation Act which provides for commencement at the "beginning" rather than end of a day or Halsbury's Laws, particularly paragraph 346, assist Mr Macnab and reject his day-by-day argument.

73. First, in relation to the purpose of the provisions it would appear, as Mr Grodzinki says, that Mr Macnab is seeking to assert a purpose restricting constructive disposal to budget day increases in duty without reference to the language of either regulation 15A of the Beer Regulations or paragraph 7.5 contrary to the observation of the Court of Appeal in *Frankland v Inland Revenue Commissioners* [1997] STC 1450 where Peter Gibson LJ said, at 1455:

> "I fully accept that in construing a fiscal statute, no less than any other type of statute, one must read the statutory words in their context, and, where the statutory purpose of the provision is discernible, one should attempt to give effect to that purpose rather than to frustrate it, so far as the words allow. But there are limits to what can legitimately be done as a matter of statutory construction. The court's function is to interpret the legislation and not to legislate under the guise of interpretation.
>
> For my part, of the authorities cited to us, I derive most assistance from what was said by Oliver LJ in *IRC v Sir John Aird's Settlement Trustees* [1983] STC 700, [1984] Ch 382. In that case the court was considering an exemption from capital transfer tax which inheritance tax succeeded. One question which arose was whether some restriction or limitation could be placed on the identity of the person referred to in the statutory phrase 'on surviving another person for a specified period'. It was argued that this should be limited to persons of a particular type. Oliver LJ pointed out that there was nothing in the 1984 [Inheritance Tax] Act which suggested or required that any limitation be put on the expression used and continued ([1983] STC 700 at 707–708, [1984] Ch 382 at 400–401):
>
> > 'A taxing statute is to some extent arbitrary in any event and the limitation here sought has to be implied from the supposition that the legislature must have had some rational purpose in mind, a more or less intelligent speculation as to what that purpose was likely to be, and an inference that what was intended was a verbal formula limited appropriately to the achievement of that purpose. It is one thing to say that the legislature could not have had a particular species in mind when it used a generic expression and quite another to say that, when the legislature used, apparently deliberately, a generic [1997] STC 1450 at 1456 expression it had in mind only one particular species ... what we are urged to do is not to

> interpret what Parliament did say, in clear and unmistakable terms, but to substitute for what it did say what we think Parliament would have said if our surmise as to the purpose of the paragraph is right and if we were now drafting a provision to give effect to that assumed purpose ... [There] are limits within which it is permissible to reframe the express words which the legislature has chosen to use. Where it is clear that a literal reading produces a wholly unreasonable or administratively impossible result and there is a context for adopting a more restricted reading, there is no particular difficulty ... Nor is there any particular difficulty where, (as, for instance, in *R v Federal Steam Navigation Co Ltd* [1974] 1 WLR 505) it is impossible, on a literal construction, to give any intelligible meaning at all to the particular provision. But this case does not fall under either of these heads. Construed literally the paragraph is perfectly intelligible and perfectly capable of operation. The problem is simply that the consequences go a great deal further than the legislature can rationally have been supposed to have foreseen. That, no doubt, points to a more limited meaning having been intended, but one must, I think, start from the position that the intention has to be deduced from the words which Parliament has chosen to use and that they must be fairly capable of the more limited construction sought to be put upon them. If not, they must be applied as they stand however strongly it may be suspected that this was not the real intention of Parliament (see *IRC v Hinchy* [1960] AC 748 at 767, 38 TC 625 at 652, per Lord Reid)."

And Chadwick LJ, at 1464:

> "I accept, of course, that s 144 of the 1984 [Inheritance Tax] Act, like any other legislative provision, must be construed in its statutory context and with due regard to the purpose which the legislature may be taken to have been seeking to achieve. But that purpose must, I think, be identified in the legislation itself and in any other relevant and admissible material. It is not permissible to speculate, a priori, as to what the legislature must or might have intended, and then strain the statutory language used in order to give effect to that presumed purpose."

74. Secondly, unlike regulations 20 (time and method of payment) 21 (furnishing of returns) of the Beer Regulations which specifically refer to "day" and "business day", there is nothing in paragraph 7.5 itself which precludes the recording of a time of day (which Mr Macnab accepts but contends that this has no legal significance).

75. Thirdly, the relevant statutory provisions concerning duty points (eg s 1(1) Finance (No 2) Act 1992, regulations 5, 6 and 7 of the HMDP Regulations and Directive 2008/118/EC – see above) clearly refer to the "time" and the "day" that such a duty point arises.

76. Fourthly, HMRC's own guidance contained in the Beer Manual, to which we have referred above (at paragraph 57), does not appear to contemplate that constructive removal can only take place on a day by day basis.

77. Finally, insofar Mr Macnab relies on the purpose of the legislation being to prevent a distortion of competition we agree with Mr Grodzinski that as it is open to all brewers to adopt the same method of calculating duty as MCBC, although MCBC may have had an initial advantage by adopting such a method before its competitors have done so, it does not follow that there is any unequal treatment or distortion of competition.

Temporal limit

78. Described by Mr Macnab as the "nuclear option", the argument that regulations 18(b) and (c) of the Beer Regulations (see above), under which the strength of the beer is ascertained by reference to its label or information on "any invoice, delivery note or similar document issued in relation to the beer", have no temporal limit was that relied upon by HMRC to make the assessments which are the subject of appeal.

79. However, as Mr Grodzinski contends, the absence of any temporal limit is inconsistent with the scheme of the legislation, including the Beer Regulations, which provide that the amount of duty payable is to be determined at the duty point and not subsequently. This is confirmed not only in the legislation, eg regulation 16 of the Beer Regulations which provides that duty shall be paid at the rate in force at the duty point, but also by paragraph 7.6 of HMRC's Beer Notice which states:

> **7.6 What is the basis of the duty charge?**
>
> Duty is based on the quantity and alcoholic strength of the beer and the rate of duty when it passes the duty point …

80. Further support can be found in the decision of the Court of Appeal in *Carlsberg UK Ltd and another v HMRC* [2012] STC 1140 in which it considered whether fractions of a penny could be ignored each time duty was calculated on a single bottle of beer. It had been argued for Carlsberg that the chargeable item of beer was its container or bottle. Rejecting that argument Lord Neuberger MR (as he then was and with whom Rafferty and Pitchford LJJ agreed) said:

> "[30] … Furthermore, as reg 8(2)(c) and (d) show (and this may be equally true of reg 8(2)(b) and (e)), the Regulations envisage that beer duty may be chargeable before the beer concerned is placed in any container. That point seems to me to raise a fundamental problem for the appellants, as it means that there cannot be an absolute rule that the chargeable item is a bottle or other container.
>
> [31] In my view, while it has elements of circularity, the item of beer on which duty is charged is that beer which the Regulations provide should be charged with duty at the duty point. That seems to me to be the natural implication of reg 15, and it is supported in terms of practicality and logic by reg 16.

> [32] Regulation 15(1) provides that 'the duty point' is the time when beer is 'charged with … duty', which suggests, at least in the absence of any provision to the contrary, that one identifies the beer at any particular duty point, and that that beer is, as it were, the unit which is to be the chargeable item. That conclusion is supported by, or at least consistent with, reg 16, which fixes the rate of duty to the rate prevailing at the duty point. (I consider that it is also consistent with reg 20(1) for the same reason). It also makes good sense.
>
> [33] As I have indicated, this is the natural conclusion which I would draw from regulations 15(1) and 16, and I can see nothing in the other regulations, or in ALDA, which calls this conclusion into question. Where regulation 15(1) applies to a brewer (as opposed to beer importer) and suspension arrangements do not apply, the duty point is effectively defined by reference to regulation 8(2). Thus, in many circumstances where the suspension arrangements do not apply, regulation 8(2)(a) may apply, so that the beer in an individual bottle, or other container, may be the chargeable item.
>
> [34] We are here, of course, concerned with brewers who have entered into suspension arrangements ('suspension brewers', as they are known), so that the duty point is identified by regulation 15(2) and (3), rather than by a combination of regulations 15(1) and 8(2). The likely duty point in those circumstances would appear to be when the beer leaves the premises in which it was brewed, by virtue of regulation 15(3)(d), so I suspect the chargeable item would normally be a lorry-load.
>
> [35] In reaching this conclusion, I am rejecting HMRC's submission, advanced below and before us by Mr Macnab, that the chargeable item in the case of suspension brewers is the totality of the beer on which duty is chargeable in a month (and payable on the 25th day of the subsequent month) pursuant to regulation 20(2). In my view, that submission confuses charging with payment, and is impossible to justify in the light of the wording of the Regulations. Additionally, it seems to me to present difficulties in terms of practicality bearing in mind the effect of regulation 16. In my judgement, Mr Grodzinski was right to say that this submission involves rewriting the Regulations, and would lead to an inconsistent approach to the assessment of the chargeable item in the case of suspension brewers and other brewers. In the Upper Tribunal, Proudman J endorsed the support Dr Avery Jones gave to HMRC's submission, but appreciated the difficulties it involved."

81. Therefore, for the above reasons, we reject the argument that the deeming provisions of regulation 18 of the Beer Regulations operate without temporal limit.

82. Additionally, if this were not the case practical difficulties, of the kind identified by Mr Grodzinski, could arise. In Mr Grodzinski's example, a lorry load of beer with an ABV stated on its labels leaves a duty suspended brewery to be delivered to a non-duty suspended customer. In accordance with the regulations there would be an excise duty point when the lorry leaves the brewery as the beer would then be released for consumption. However, if some six weeks later the brewer issued an invoice showing

the ABV at 4.5%, if there were no temporal limit on regulation 18(c) of the Beer Regulations, excise duty would then be due by reference to the greater ABV even though, under regulations 20 and 21 of the Beer Regulations the time for completing the return and paying the duty had long since passed.

Regulation 25

83. In support of HMRC's construction of the Beer Regulations, Mr Macnab relies on regulation 25 of the Beer Regulations (which we have set out above). In summary, this provides that until beer is sold by way of retail or otherwise supplied for consumption, "no person may carry out any operation on, or in relation to the beer" after the duty point which, if carried out before the duty point, would have resulted in a greater amount of duty payable than there had been at the duty point.

84. Mr Macnab says that if the construction of the Beer Regulations advanced by MCBC is correct it would necessarily follow that its action in packaging the beer into cans and kegs indicating a greater ABV involves a contravention of regulation 25.

85. Although we have not set out that part of the Beer Regulations in full, regulation 25 is the final regulation of Part VIII of the Beer Regulations, 'Operations on Beer' which commences with regulation 22, which concerns 'mixing' of beer. Regulation 23 and 24 concern 'addition of substances' to the beer and 'dilution of beer' respectively.

86. It is not disputed that the essential function of the Beer Regulations, as delegated legislation, is to carry out the purposes of the enabling Acts (in this case, ALDA, Customs and Excise Management Act 1979 ("CEMA") and Finance Act (No. 2) 1992); that pursuant to the rule of primary intention, the intention of the legislature, as indicated in the enabling Acts, is the prime guide to the meaning of the delegated legislation (and the extent of the power to make that legislation); and, the general interpretative principle is that delegated legislation is to be construed in the same way as the enabling Acts. As s 11 of the Interpretation Act 1978 provides:

> Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act.

87. Applying those principles Mr Macnab contends that Regulation 25 of the Beer Regulations is to be interpreted in the light of the purpose of and powers granted by ALDA 1979 and s 41A ALDA in particular. This contains provisions and regulation-making powers in relation to holding beer in duty suspension and carrying out "operations" on beer while in duty suspension. He refers to s 41A(2) ALDA which provides that the person entitled to hold beer in duty suspension may also be permitted to carry out "such operations as may be prescribed" on, or in relation to, such of the beer as may be prescribed and s 41A(7)(a) ALDA which specifically provides that, as respects duty suspended beer, regulations under section 49 may make provision:

> (a) regulating the holding or packaging of, or the carrying out of other operations on or in relation to, that beer on registered premises without payment of the duty.

88. Mr Macnab contends that the use of the word "other" in s 41A(7)(a) ALDA is critical, as it indicates that "packaging" of the beer is itself an "operation" on, or in relation to, the beer. As such he submits that there is no basis for limiting the scope of regulation 25 in the manner for which MCBC contends. In addition, Mr Macnab refers to s 93(2)(c) CEMA, one of the provisions under which the Beer Regulations were made, which also refers to "operations" albeit in relation to these being carried out on "warehoused goods".

89. Mr Grodzinski argues that as regulations 22 to 24 are clearly concerned with doing something physical to the beer, regulation 25 should also be read as of being of a similar category, namely action altering the physical characteristics of the beer which, he says, cannot include the action of packaging beer with a labelled ABV as this does not fall within the natural meaning of performing an operation on, or relation to, beer.

90. He says that s 41A ALDA, as is apparent from its content (see above), is concerned with arrangements for the suspension of duty and the registration of persons and premises for duty suspension ie prior to a duty point arising. Accordingly, given its context the reference to packaging and other operations in s 41A(7)(a) ALDA can only refer to something occurring while the beer is in duty suspension and therefore cannot apply to regulation 25 of the Beer Regulations which concerns alteration of physical characteristics of beer subsequent to the duty point.

91. Additionally, Mr Grodzinski contends, Part VIII of the Beer Regulations, which includes regulation 25, was made under s 49 ALDA and it is clear from s 49(1)(h) ALDA which regulates "prohibiting the addition of substances to, the mixing of, or the carrying out of other operations on, or in relation to beer" that it uses "operations", as in regulation 25, to refer to alteration of the physical characteristics of the beer rather than packaging.

92. We prefer Mr Grodzinski's construction of regulation 25 of the Beer Regulations over that of Mr Macnab and consider that it applies to the physical characteristics of the beer rather than packaging. Not only are the duty suspense regulations made under s 41A(7) ALDA principally carried into effect by the HMDP Regulations but neither s 41A(7) nor s 93(2)(c) CEMA are concerned with the regulations contained in Part VIII of the Beer Regulations. Further support, if it were needed, that regulation 25 of the Beer Regulations is concerned with the physical characteristics of the beer rather than its packaging can be found in HMRC's guidance contained in its Beer Manual, BEER3200 'Operations on Beer'. After sections on 'Additions' and 'Dilution' it is stated:

> "**BEER3240 Other Additions**
>
> Until beer is sold or supplied to the consumer, no substance that is likely to cause an increase in the duty liability may be added after the

> duty point without prior approval of HMRC. The legal basis for this is regulation 25 of the Beer Regulations 1993.
>
> Detailed information on the addition of other substances to beer can be found in section 19 of Notice 226."

93. Section 19 of Notice 226, the Beer Notice refers to "Additions to beer" and section 19.4.1 states:

> "Once beer has passed the duty point no substance which causes or may cause an increase in the duty liability of the beer may be added until the beer is sold or supplied to the consumer unless we have approved the addition of that substance. …"

94. Therefore, in conclusion, we do not accept that HMRC's construction of the Beer Regulations is assisted by regulation 25.

Drawback

95. It is clear from Mrs Winfield's evidence, which explained the operation of the drawback scheme, that HMRC have repaid duty to customers of MCBC based on an ABV of 4% whereas the duty had been paid by MCBC by reference to an alcoholic strength of 3.7%. Mr Macnab says that this is a real problem for the practical administration of the duty.

96. However, as Mr Grodzinski points out, the repayment of duty is very much in the control of HMRC. This is clear from the Excise Goods (Drawback) Regulations 1995 (the "Drawback Regulations") regulation 8(1) of which provides:

> (1) Where an eligible claimant intends to claim drawback on eligible goods warehoused for export he shall comply with the following conditions—
>
> (a) before removal to a warehouse, he shall deliver to the Commissioners at such address as they shall specify a notice in writing stating that he intends to claim drawback and containing the following particulars—
>
> (i) his name and address,
>
> (ii) the name of the premises at which the goods may be inspected prior to their removal to warehouse,
>
> (iii) the description of the goods including their nature and quantity,
>
> (iv) the amount of duty paid in respect of the goods, and
>
> (v) the address of the warehouse to which the goods are being removed;

97. Regulation 12(3) of the Drawback Regulations provides

> If the Commissioners are not satisfied that the amount of duty claimed may be drawn back but are satisfied that a lesser amount of duty may be drawn back they may, in such circumstances as they see fit, permit the drawback of that lesser sum.

98. Under Regulation 13 Drawback Regulations the Commissioners may cancel drawback and the person to whom it was paid be liable to repay any sum paid in contravention of the Regulations.

99. The guidance contained in HMRC's Notice 207, Excise Duty drawback, at paragraph 4.8 sets out the documents required for a drawback claim as evidence that UK duty has been paid. This includes the name and VAT registration number of the business that originally paid the duty, address, the brewer's reference number and copies of delivery notes.

100. Although MCBC had written to HMRC on 18 August 2012 to notify that it was to commence calculation of duty by reference to the actual ABV of the beer, as that letter was not seen by the officers concerned (see paragraph 24, above) we accept that difficulties may have arisen in relation to drawback claims before HMRC was aware of this. However, although it may impose an extra burden on HMRC which is now aware of how MCBC calculates its liability to duty, we do not consider it to be so onerous that it would prevent HMRC from identifying any similar issues arising in subsequent drawback claims which include, as evidence that duty has been paid, documentation from MCBC.

EU law

101. Both MCBC and HMRC say that their construction of the domestic legislation is fully compliant with EU provisions set out above.

102. Mr Grodzinski says that MCBC's case on EU law is "simple" in that there is no provision in Directive 92/83/EEC (see above) under which HMRC have a discretion to deem strength of beer by reference to anything higher than its actual strength. However, Mr Macnab contends that MCBC's EU law argument is answered sufficiently by *Carlsberg UK Ltd v HMRC* [2013] UKFTT 573 (TC) at [87].

103. In that case, the First-tier Tribunal (Judge Herrington and Ms Stalker) considered whether Carlsberg could calculate its liability to duty by reference to the Allowed Method (on the basis of actual ABV as described by the Tribunal at [85], see below) unless it was higher than the ABV stated on a delivery note, in which case the calculation of duty was on the basis of the ABV as stated on the delivery note. Rejecting Carlsberg's argument, the Tribunal observed:

> "85. We accept Mr Macnab's [counsel for HMRC] submission that the Allowed Method is to be characterised as a declared strength method based on averaging the strengths of the various batches of beer produced in each month and assumes that the average Actual ABV will be approximately equal to the declared strength, with the result that duty is paid on the Actual ABV, taking into account the ups and downs of the various months. By contrast, what Carlsberg contends for is not based on the average ABV because in seeking repayment for an isolated month it takes no account of the fact that no duty is paid in respect of other months where the Actual ABV is greater than the Declared ABV. It would mean that the lesser of the two figures was

> always taken and would not produce an average figure over time that tended towards the declared strength. Consequently, we see no basis on which it is necessary to imply a condition of the nature contended for by Carlsberg to give efficacy to the Allowed Method; it can operate as intended so as to ensure that the Declared ABV and average Actual ABV correlate over time without the implication of such a condition.
>
> 86. We therefore turn to the question as to whether the Allowed Method without the implied condition that Carlsberg contends for is compatible with the EU Directives. In accordance with well established principles, there is an obligation upon us to construe UK domestic legislation in a manner which conforms to the UK's obligations under those Directives and if it is necessary to write in words to the legislation to achieve that result then that is a course we should adopt. This principle will apply to the Allowed Method which, as we have found, is part of the UK statutory framework pursuant to which liability to pay beer duty is assessed. Article 1 of Council Directive 92/83/EEC requires Member States to levy beer duty "by reference … to the number of hectolitre/degrees of alcoholic strength by volume". We must construe the Allowed Method so that it conforms as far as possible to that obligation.
>
> 87. We reject Mr White's [counsel for Carlsberg] submission that the Allowed Method without the implied condition for which he contends would be incompatible with the Directive. Directives operate at a high level of generality and in our view the Allowed Method, which operates in a manner that is designed to ensure that the Declared ABV and Actual ABV correlate over time, is consistent with the principle laid down in the Directive that the duty is fixed "by reference to" the actual alcoholic strength. It cannot be the case that under the Directive duty can only be calculated by reference to the actual amount of alcohol in each batch of beer brewed so that there must be some tempering of that absolute principle in order that a practicable method of calculating and collecting duty is provided for. In our view Mr Macnab is correct in his submission that procedures for payment and repayment of duty are left to Member States to be dealt with in their domestic legislation and Article 9 of Council Directive 2008/118 is, as set out in paragraph 9 above, sufficient authority for that proposition. In our view the practical measures taken by HMRC in establishing the Allowed Method fall within the scope of that power and do not derogate from the underlying principle in Article 1 of Council Directive 92/83/EEC. We therefore reject Mr White's submission that the Allowed Method without the implied condition for which he contends offends the principles of effectiveness, equivalence, equality of treatment, non-discrimination and fairness."

104. We note that although the Tribunal at [86] referred to Article 1 of Directive 92/83/EC, it is, as is clear from the Directive, set out above, Article 3 which provides that, excise duty on beer shall be charged "by reference … to the number of hectolitre/degrees of actual alcoholic strength by volume", that the Tribunal had in mind and it is perhaps unfortunate, especially for the purposes of the present case, that it omitted the reference to "actual" alcoholic strength in its citation of the provision. However, we agree with the Tribunal that, in accordance with well established

principles, there is an obligation upon us to construe UK domestic legislation in a manner which conforms to the obligations under the Directives and if it is necessary to write in words to the legislation to achieve that result then that is a course we should adopt.

105. Mr Macnab contends that reasoning in the case is equally applicable to the present case. He says that Directive 92/83/EC operates, as the Tribunal observed, at a high level of generality and neither it nor Directive 2008/118/EC nor the Rates Directive is concerned with how "actual alcoholic strength by volume of finished product" is to be measured as such matters are expressly left to a Member State pursuant to Article 9 of Directive 2008/118/EC.

106. However, Mr Grodzinski submits that the Tribunal's observation that the Directive operates at a "high level of generality" is not apposite in the present case. Unlike in *Carlsberg* where there was a necessity to temper the absolute principal for practical reasons, it is not disputed that MCBC has been able through the use of Anton Paar machines and its brewing techniques to brew to a precise strength and accurately measure the actual ABV of the beer. Additionally, Mr Grodzinski says that we should not follow the Tribunal in *Carlsberg* [87] (which is not binding on us) which was wrong to find, at [87], that Article 9 Directive 2008/118/EC provides sufficient authority that all matters, such as the determination of the strength of the beer are for the Member State to decide.

107. Referring to Article 9 (which is set out above) Mr Grodzinski contends that it is not concerned with how excise duty is to be fixed as this is the province of Directive 92/83/EEC, "on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages". In contrast, Article 9 of Directive 2008/118/EC provides Member States with a discretion as to the administrative procedures to be applied in levying and collection of excise duty such as the time and manner of payment.

108. Such a construction, Mr Grodzinski submits, is consistent with the decision of the Court of Appeal at [35] in the first Carlsberg case to which we have previously referred (at paragraph 80, above), *Carlsberg UK Ltd and another*. Mr Grodzinski also cited the decision of the Upper Tribunal (which included Judge Herrington) to which we have also referred (in paragraph 69, above) in *B & M Retail Ltd v HMRC* in the Tribunal made a number of observations on the principles to be derived from the wording of the 2006 Directive, in particular, at [26]

> "… there is a distinction to be drawn between the concept of chargeability to excise duty and the levy and collection of that duty, art 9 providing that the latter is to be determined according to the procedure laid down by the member state in which the goods have become chargeable with excise duty."

109. Having regard to the terms of Article 9 itself we prefer and adopt the approach of the Upper Tribunal in *B & M Retail*, which at [105] clarified the expression 'levied' as being "a synonym for 'assessed'", over that of the First-tier Tribunal in *Carlsberg*.

110. The structure of, and chargeability to, excise duty is contained in Directive 92/83/EEC whereas Directive 2008/118/EC is concerned with the assessment to, and collection of, that duty which is left to Member States to be dealt with in their domestic legislation. In our judgment this is consistent with the requirement for harmonisation of duty on alcohol and the practical necessity of leaving matters of assessment and collection of duty to Member States.

111. We therefore conclude that Article 9 of Directive 2008/118/EC cannot have the wide application that Mr Macnab contends. Moreover, given that Article 3(1) of Directive 92/83/EEC provides that excise duty levied by Member States on beer "shall be fixed" by reference the number of hectolitre/degrees of "**actual** alcoholic strength by volume" (emphasis added), of finished product and is supported by other provisions of the same directive eg Article 5(1); Article 8(1); Article 9(3); and Article 12(1), we find MCBC's argument to be consistent with EU law.

Conclusion

112. For the above reasons the appeal is allowed.

Appeal Rights

113. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 20 APRIL 2017