[2018] UKFTT 0066 (TC)

TC06331

Appeal number: TC/2013/07977

EXCISE DUTY – preliminary issue - assessment on wholesaler in possession of non-duty paid excisable goods – whether law as explained in* B&M Retail *proportionate – whether Tribunal has jurisdiction to consider HMRC's exercise of policy in assessing appellant – meaning of 'holding' excisable goods

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAWSON'S (WALES) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 7 December 2017

Mr M Firth, Counsel, instructed by Tristan Thornton of TT Tax, for the Appellant

Ms N Barnes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

PRELIMINARY DECISION

Background to this decision

1. The appellant is a wholesaler of alcoholic drinks. At issue in this appeal are some of the alcoholic drinks supplied to it in the period 21 February 2011 to 15 May 2012, being those on which it was assessed to excise duty on 17 October 2013 in the sum of £3,729,381.

2. It appealed against the assessment in 2013. The appeal was then stayed behind the preliminary issue in the appeal of *B&M Retail Ltd.* That preliminary issue was decided against the taxpayer by the Upper Tribunal in its decision published on 10 October 2016 ([2016] UKUT 0429) ('the *B&M* decision'). As there was no appeal by B&M against that decision, this appeal (together with many others) was released from the stay.

3. In the light of the *B&M* decision, the appellant then amended its grounds of appeal and HMRC amended its statement of case. Then in May 2017, the appellant applied for a preliminary issue to be determined in this appeal and HMRC consented. The Tribunal agreed to the preliminary hearing on the basis that if the Tribunal were to determine the preliminary issues in favour of the appellant, the appeal would be successful without the need to determine the disputed issues of fact and other disputed matters of law, and there would be real costs savings.

Assumed facts

4. The parties agreed to a set of assumed facts for the purpose of the preliminary hearing. These are facts which one or other of the parties would seek to prove if the matter went to a full hearing. I summarise the assumed facts as follows.

5. The appellant purchased certain alcoholic drinks from about 10 suppliers. It is assumed for the purposes of the preliminary hearing that the appellant's immediate suppliers at no point took physical possession of the goods the excise duty assessment on which was at issue in this appeal. It is, however, also assumed that the appellant's immediate supplier arranged for the goods to be shipped and delivered to the appellant's premises. More particularly, it is assumed that the appellant's immediate suppliers had the power to instruct the persons (albeit unidentified) who had physical possession of the goods to deliver them to the appellant, and that that power was exercised in favour of the appellant in respect of the goods at issue in this appeal.

6. It is assumed, as can be inferred from the above, that the goods the subject of the assessment were physically held by the appellant at the point they were seized by HMRC. It is also assumed, and follows logically, that prior to the goods being physical held by the appellant, the goods were physically held in the UK by someone else. It is assumed that that person cannot be identified.

7. It is also assumed that the chain of supply which culminated in the supplies to the appellant of the goods at issue in this appeal commenced with a missing, de-registered or hijacked company. It is assumed that none the traders in this chain of supply subsequent to that missing company, but prior to the appellant, can be shown ever to have had physical possession of the goods.

8. The appellant was given by its suppliers W5 documents (certifying payment of excise duty and VAT) in respect of some of the supplies in issue: it is assumed, for the purpose of this preliminary hearing only, that those documents were forgeries and that no excise duty was paid on the goods the subject of the assessment.

Preliminary Issue

9. The issue in *B&M*, the case behind which this appeal had been stayed, concerned facts very similar to those in this appeal. And that issue was whether the appellant, who had purchased and then held excisable goods which could not be shown to be excise duty paid, was liable to the excise duty on those goods even though logic dictated that there must have been an earlier duty point in respect of those goods prior to them coming into the appellant's ownership and possession. The Upper Tribunal ruled that an assessment in such circumstances was valid (see [157]).

10. As I have said, after the *B&M* decision, the parties made a joint application which was allowed by the Tribunal ('the FTT') for the Tribunal to determine three matters as a preliminary issue in this appeal. Those three matters were as follows:

> (1) Whether r 6(1)(b) of SI 2010/593 (The Excise Goods (Holding, Movement and Duty Point) Regulations 2010) ('the Regulations') and/or Article 7(2)(b) of Directive 2008/118/EC ('the Directive') are incompatible with the principles of proportionality and legal certainty either:
>
> > (a) Generally; or
> >
> > (b) Where the person assessed upon the basis of those provisions has identified its supplier to the relevant tax authority.
>
> (2) Whether the FTT has jurisdiction to consider a challenge to a decision to assess under r 6(1)(b) of the Regulations based on its unreasonableness and/or public law principles on an appeal under Finance Act 1994 s 16(5);
>
> (3) Whether a person who has de facto and/or legal control of the goods but who does not have physical possession of the goods 'holds' the goods for the purpose of r 6(1)(b)/Art 7(2)(b) consistent with the definition of 'held' under r 13.

11. I will refer to these three issues, respectively as the issues on:

> (1) Proportionality;
>
> (2) Jurisdiction;

(3) Holding.

The reason why these three preliminary issues would resolve the appeal in the appellant's favour if the appellant succeeded in this hearing is as follows.

12. While the appellant's stated position was that it did not challenge the correctness of the interpretation of the legislation (referred to in (1) of §10 above) given by the Upper Tribunal in *B&M,* nevertheless (a) it considered that the legislation as interpreted by the Upper Tribunal to be disproportionate and unlawful, and (b) it did not agree with HMRC over how the ruling in *B&M* should be interpreted.

13. The proportionality issue, the first of the three preliminary issues, was concerned with whether the legislation as interpreted by the Upper Tribunal lacked proportionality in general because it appeared to give rise to multiple duty points; and even if it was proportionate in general, whether it was disproportionate in certain cases if its effect was that the appellant could be assessed even though the appellant could identify its supplier.

14. If I decided the legislation was proportionate, the appellant's next position was that, as a matter of its own policy, HMRC ought to have discharged the assessment on the appellant where an earlier duty point was identified, and their (alleged) failure to apply their own policy in this case was (said the appellant) within the jurisdiction of this Tribunal and so I should discharge the assessment. So the second preliminary issue was the extent of the jurisdiction of the Tribunal.

15. The last issue 'holding' was relevant to both these matters. The appellant contended that the meaning of 'holding' was wide and included legal ownership without physical possession. If it was right, it meant each supplier in the supply chain before the appellant had been 'holding' the excise goods, and even on HMRC's interpretation of the Upper Tribunal decision in *B&M Retail,* that meant that there were at least one *identifiable* duty point prior to the appellant's holding of the goods. Following from that, the appellant's case was that (a) the legislation as interpreted in *B&M* meant that the assessment on it should be discharged, and, even that was wrong (b) HMRC's policy on assessments under this legislation meant that, as a matter of public law, HMRC should not have assessed the appellant, or should have discharged the assessment on proof of identity of the appellant's supplier, and its failure to do so was within the jurisdiction of the Tribunal.

16. However, if HMRC was right to see 'holding' as having a narrow definition which did not include legal ownership without physical possession, then no earlier duty point could be identified and the interpretation of the *B&M* decision and the extent of the jurisdiction of the Tribunal would be irrelevant.

Issue 1: the proportionality issue

17. It is a basic tenet of EU law that EU directives, and national law which implements or derogates from them, must be proportionate. The legislative means used must be justified by the purpose.

18. The appellant's position is that in *B&M Retail* there was no challenge to the proportionality of the legislation under consideration in that appeal, and therefore no ruling on it. The case was one of statutory interpretation. It is therefore open to this appellant to challenge the proportionality of both the UK and EU law at issue in this appeal.

19. HMRC appeared to accept that the proportionality challenge was open to the appellant (although inevitably of the view that the challenged legislation was proportionate). I am not so sure it is open to the FTT to consider the matter. Upper Tribunal decisions are binding on this Tribunal. Although the Upper Tribunal in *B&M* do not appear to have been directly asked to address the question of proportionality, to me it seems implicit that the Upper Tribunal's interpretation of the UK legislation, and the EU legislation which it implemented, must have been with the law of proportionality and legal certainty in mind. Theirs was an exercise in statutory interpretation: but they would have interpreted the legislation with the need for it to comply with EU principles in mind.

20. I therefore record the parties' submissions on this subject, and reach a conclusion on it because I was asked to do so: I recognise that on appeal the Upper Tribunal may conclude that I had no jurisdiction to consider the matter at all.

The law on proportionality

21. The parties were not entirely agreed what test of proportionality should be applied to the UK legislation at issue in this preliminary hearing. Ms Barnes summarised the principles of the law on proportionality in her skeleton argument, as follows:

> (1) There is a two-stage test (see *oao Lumsden & others*, [2015] UKSC 41 at [33]) for considering whether legislation is proportionate: (i) Is the measure suitable or appropriate to achieve the objective pursued? (ii) is the measure necessary to achieve that objective or could that objective be obtained by a less onerous method?
>
> (2) The intensity of the scrutiny of the measure by the courts depends on the type of measure under review (*Lumsden* at [34]);
>
> (3) Where an EU measure is challenged, the test to be applied is where the measure is 'manifestly inappropriate having regard to the objection which the competent institution is seeking to pursue' (*Lumsden* at [40-49]. It seems implicit in what Ms Barnes said that the second of the two tests at (1) above is not relevant here;
>
> (4) While a national court can itself decide that a challenge to an EU measure is unfounded and dismiss it, if it considers that a challenge is well-founded, it should refer the matter to the CJEU rather than deciding the matter itself: *International Air Transport Association* (2006) C-344/04 at [30]

(5) Where a national measure is challenged, the test to be applied depends upon whether the measure implements an EU measure or derogates from a fundamental freedom.

(6) Where the national measure implements an EU measure, the test is whether the same 'manifestly inappropriate' test referred to above; again it seems implicit in what Ms Barnes said that the second of the two tests at (1) above is not relevant here;

(7) But where the national measure derogates from a fundamental freedom, then both the tests mentioned in (1) are relevant and in particular the test of proportionality is the strict test of whether a different measure would have been equally effective but less restrictive of the freedom in question.

22. Mr Firth's view was that:

(1) The second part of the two-stage test referred to at (1) above was (normally) inapplicable when the proportionality of an EU measure was challenged, but was (normally) applicable when a national measure was challenged, even one implementing a directive; and

(2) While the test for proportionality when considering an EU measure was whether it was 'manifestly inappropriate', the test for a national measure, even one implementing a directive, was whether it was 'manifestly disproportionate'.

(3) His main disagreement was with points (5) and (6). Mr Firth's point was that what the Supreme Court in *Lumsden* said about measuring the proportionality of national measures was:

> [73]...As when assessing the proportionality of EU measures, to the extent that the directive requires the national authority to exercise to discretion involving political, economic or social choices, especially where a complex assessment is required, the court will in general be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature, the court has applied a 'manifestly disproportionate' test.....
>
> [74] where, on the other hand, the member state relies on a reservation or derogation in a directive in order to introduce a measure which is restrictive of one of the fundamental freedoms guaranteed by the Treaties, the measure is likely to be scrutinised in the same way as other national measures which are restrictive of those freedoms.

Therefore, said Mr Firth, although the UK Regulations at issue in this case were intended to implement a Directive which gave the UK a discretion on how to implement it, and while the Regulations did not implement it in such a way as to restrict a fundamental freedom, the Directive did not involve the exercise of political, economic or social choices, and so was not caught by what the Supreme Court said in either [73] or [74]. Nevertheless, said Mr Firth, looking at decisions of the CJEU involving similar exercises of discretion, the test to be applied to the Regulations

should be closer to the more strict one in [74] (ie (7) above) than the less strict one in [73] ((6) above).

23. I go on to consider what is the correct test of proportionality in this case for the UK regulations in issue. I start with the two cases on which Mr Firth relied.

EMS- Bulgaria Transport OOD [2012] C-284/11

24. In this case, the taxpayer challenged a measure which prevented input tax deduction as a penalty for late compliance. The proportionality test applied by the CJEU to that measure was the strict test of whether the same objective (compliance) could be met by a less onerous measure than preventing deduction of input tax: the disputed measure failed the test.

25. However, I agree with Ms Barnes that the case offers Mr Firth's position no support because the national legislation blocking the right to input tax deduction imposed a restriction on what the CJEU regarded as a fundamental principle of VAT. The court said at [69]:

> Member States must, in accordance with the principle of proportionality, employ means which, whilst enabling them effectively to attain the objective of preventing possible tax evasion and avoidance, are the least detrimental to the objectives and principles laid down by European Union legislation, which include the fundamental principle of the right to deduct VAT

26. The most that can be said is that this case shows that rule (7) in §21 above is more accurately:

> (7) But where the national measure derogates from a fundamental freedom, or from a fundamental principle of the directive being implemented, then the test is the much stricter one of whether a different measure would have been equally effective but less restrictive of the freedom in question.

Vakaru Baltijos laivų statykla' UAB [2017] C-151/16

27. The second case relied on by Mr Firth was similar to *Bulgaria Transport* in that the challenged national legislation blocked a taxpayer claiming a tax exemption, to which he was otherwise entitled, if there was a lack of compliance with certain formal obligations. The CJEU applied the strict test of proportionality when assessing the legality of the national legislation.

28. It seems to me that the same point applies as with the *Bulgaria Transport* case: the directive required a tax exemption to be given if certain conditions were met. By refusing exemption when there was non-compliance with formal requirements, it inevitably followed that the national measure might prevent a person benefiting from the exemption even though they actually met the directive's conditions for exemption.

29. It seems to me that such legislation should fall squarely within the strict test because it was a measure which derogated from a fundamental principle of the directive it was implementing. It was not implementing the directive but derogating from it.

30. The appellant referred me to no other authority in support of his proposition; and as I have said, the two to which he did refer me, did not support his proposition. Moreover, logic suggests that a national measure which implements a directive *without* derogating from a clear principle contained in that directive should have a less strict test of proportionality applied to it than one which implements a discretion in the directive by *derogating* from a clear principle contained within it.

Conclusion on the test for proportionality

31. So, unless the appellant can identify a principle in the 2008 directive from which the UK regulations in issue derogate, the appropriate test of proportionality is not whether a different measure would have been equally effective but less restrictive of the freedom/right in question. The regulations should instead be tested with the same degree of strictness as with any other non-derogating implementing measure.

32. But what is that test? Mr Firth is right (see (2) of §22 above) to say the test is 'manifestly disproportionate' rather than 'manifestly inappropriate'; see [73] of *Lumsden* itself. While I do not think the CJEU has made clear what the distinction is between these two tests, nevertheless it would make sense that the test for the proportionality of a national measure implementing the directive, but nevertheless exercising its discretion in doing so, is more rigorous than the one applied to the directive itself. But as *Lumsden* makes clear, the test is not the strict 'least detrimental' measure that nevertheless still attains the same objective. Nevertheless, in assessing whether a national measure (implemented using a discretion but without derogating from a fundamental principle of the EU or of the Directive it implemented) is 'manifestly disproportionate', it may be relevant to consider any alternative methods of achieving the same objective. But the measure does not have to be shown to be 'least detrimental' method of implementation in order to be proportionate.

33. With that in mind, I consider the appellant's case on the proportionality of the Directive and the Regulations. Firstly, I consider the legislation itself, and then its interpretation in the *B&M* decision.

Is the legislation at issue in this appeal proportionate?

EU law at issue in this appeal

34. The relevant EU directive is 2008/118/EC which provides at Regulation 7 that a release for consumption gives rise to a charge to excise duty; it then specifies what is a release for consumption, as follows:

Time and place of chargeability

> 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.

35. Article 8 sets out who is responsible to pay the excise duty when there is a release for consumption. The person liable where the release is under Article 7(2)(b) (the provision with which this appeal is concerned) is stated to be:

> 'the person holding the excise goods and any other person involved in the holding of the excise goods'

36. The actual charging of the tax is left to the discretion of the member States, as Article 9 provides:

> '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.'

UK law at issue in this appeal

37. The relevant UK law is contained in the Excise Goods (Holding Movement and Duty Point) Regulations 2010 SI no 593 ('the Regulations'). Regulation 5 provides, in line with the Diretive, that there is an excise duty point at the time when excise goods are released for consumption within the UK. Regulation 6, the regulation at the heart of this appeal, defines when a release for consumption in the UK takes place. It provides as follows:

> **Regulation 6(1)** Excise goods are released for consumption in the UK at the time when the goods –
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

38. It goes on to provide various definitions, including the rules on the person liable to the excise duty if there is a release under (a), (b), (c) or (d). Regulation 10 deals with a release under 6(1)(b) as follows:

> **Regulation 10**(1) the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.
>
> (2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

39. As I have indicated, these provisions were considered in detail by the Upper Tribunal in *B&M*. That was also a case where the assumed facts were that a number of different persons in succession had held the excise goods, on which no duty had been paid, outside a duty suspension arrangement. HMRC assessed the person they found to be in physical possession of the goods. The Tribunal found that that assessment could not be challenged merely because there must have been an earlier duty point in circumstances where HMRC had not assessed that earlier duty point. The Upper Tribunal's actual conclusion was:

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

40. In effect, as both parties appear to agree, the effect of the *B&M* decision is that UK legislation properly interpreted results, on certain fact patterns, and in particular the assumed fact pattern in *B&M* and this appeal, in there being more than one release for consumption and more than one excise duty point, arising on the same goods. The appellant's position is that creating more than one excise duty point for the same excise duty is not a proportionate method of achieving the objective of the Directive: multiple taxation, says the appellant, is not proportionate.

41. So far as I understand it, the matter of interpretation on which they did not agree was whether more than one duty point could exist at the same time, and in particular, whether the , as interpreted by the Upper Tribunal, meant that HMRC could not assess the appellant if they could identify an earlier duty point. The appellant's position was that a trader in the same position as the appellant could only be assessed if no earlier duty point could be identified; and, if already assessed, the assessment had to be vacated on identification of an earlier duty point. The appellant's definition of 'holding' (see issue 3 of this preliminary hearing) would mean that its supplier would have triggered a duty point on becoming the owner of the goods, and therefore the appellant's interpretation of the legislation was that the assessments at issue in this

appeal ought to be vacated because it could identify its supplier (and therefore an earlier duty point) in all cases.

42. I consider how the B&M decision should be interpreted below, but first consider what is the appropriate test of proportionality.

Which is the appropriate test of proportionality to apply?

43. The appropriate test of proportionality to apply to the Directive is whether it is 'manifestly inappropriate' (see §§21-22 above and *Lumsden* §§40-49). When assessing proportionality of UK legislation, as is clear from the test set out above at §§31-32, I have to decide whether or not the legislation derogates from a fundamental freedom, or from the Directive it is seeking to implement, on the one hand, or is simply implementing the Directive on the other hand, as a more strict test applies to the former than the latter.

44. There was no suggestion that the UK legislation at issue in this hearing derogates from a fundamental freedom. But does it derogate from a fundamental principle of the Directive? The appellant's position is that by permitting more than one excise duty point on the same goods, the UK legislation does derogate from the Directive.

45. That could only be true, of course, if the Directive did not permit there to be more than one duty point in respect of the same goods. So I have to consider that question.

46. It is relevant to note, firstly, that the UK legislation is extremely similar to the EU legislation. It uses some different wording, but a read of the provisions above shows how very similar the two provisions are. Secondly, the Upper Tribunal interpreted the UK legislation with the EU legislation in mind: there was no suggestion that they saw the UK legislation as diverging from the EU legislation.

47. More specifically, it seems inherent in the Directive that it anticipates that the same goods might trigger more than one duty point. The wording of Art 7(2)(b) alone refers to a holding in circumstances where excise duty has not been paid: it is difficult to see how excise goods could be held unless an excise duty point had already arisen by earlier the importation or production of the goods.

48. For instance, Article 7(2)(a) creates an excise duty point when goods leave a duty suspension arrangement while Article 7(2)(b) creates an excise duty point when they are held outside a duty suspension arrangement. So goods which leave a duty suspension arrangement and are then held outside it by someone other than the holder when they left the arrangement, would have a minimum of two excise duty points. Much the same can be said of Articles 7(2)(c) and (d) in combination with (b).

The CJEU's view on the matter?

49. The history of the provisions seems to bear out that the EU legislature contemplated goods having more than one excise duty point. The predecessor Directive only had provisions equivalent to Article 7 (a),(c) and (d). In a case *Van*

De Water C-325/99 concerning that earlier Directive, the CJEU ruled that holding goods outside duty suspension arrangement was implicitly caught by that provision; following that ruling what is now Art 7(2)(b) was inserted into the current Directive to ensure the explicit wording of the legislation reflected that decision.

50. *Van de Water* concerned a person found to be in possession of non-duty paid excisable goods (pure alcohol), which he had not produced himself. The CJEU ruled:

> [35]....the Community legislative has clearly indicated that any production, processing, holding or circulation outside a suspension arrangement gives rise to the chargeability of the excise duty.
>
> [36] In those circumstances, once it is established...that such a product has departed from a suspension arrangement without the excise duty having been paid, it is clear that the holding of the product in question constitutes a release for consumption within the meaning of [the EU legislation] and that duty has become chargeable.
>
> ....
>
> [42] ...the Directive must be interpreted as meaning that the mere holding of a product subject to excise duty ...constitutes a release for consumption where duty has not yet been levied on that product ....

51. The CJEU do not qualify what they say in [42] by suggesting that the duty point only arose on Mr Van de Waters' holding in circumstances where none had arisen earlier. So its seems implicit that the CJEU thought Mr Van De Water's had triggered a duty point irrespective of whether there was an earlier duty point. Nevertheless, it is true to say that the CJEU did not expressly consider the point.

52. The CJEU was required to consider the point in the case of *Gross* (2014) C-165/13. That case concerned similar facts to this case, but a different legislative provision under both UK and EU because the crucial difference was that it was known in *Gross* there had been an earlier release for consumption of the excisable goods in another member State. The liability to excise duty in the second member State arises under Article 33, and not Article 7. Unlike Art 7, Art 33 had the requirement that the holding in the second member state was for 'commercial purposes' before an excise duty point was triggered. Nevertheless, the provision is otherwise quite similar to Art 7(2)(b) and the same question arose as here, which is whether there could be only one excise duty point in the same member state.

53. The CJEU ruled at §25 that the Directive 'must be interpreted as meaning that any holder of the products at issue is liable to excise duty' and:

> '[26] a more restrictive interpretation, to the effect, that only the first holder of the products at issue is liable to excise duty, would defeat the purpose of Directive 92/12. ...such an interpretation would render more uncertain the collection of excise duty....

What did the Upper Tribunal say on the matter?

54. The Upper Tribunal in *B&M* said at [105] that *Van de Water* was 'consistent' with the possibility of the law providing for more than one release for consumption of the same goods, but did not consider that it was necessarily implicit in the CJEU's decision that there could be more than one release for consumption (see [104]). But in respect of *Gross*, the Upper Tribunal's conclusion was that, although dealing with a different legislative provision,

> [118]....*Gross* provides clear authority that once excise goods in respect of which duty has not been paid are circulating within the Member State of their destination then the authorities of that Member State have the ability to choose which of sequential holders of the goods to assess, provided that there has not been a prior assessment. That is consistent with the underlying policy of the 2008 Directive...that it is the duty of the Member State concerned to ensure that duty is paid on goods that are found to have been released for consumption. The decision in the case is therefore consistent with the principle that it should be possible to assess a person found to be holding goods in respect of which duty has not been paid, even though there may have been a prior release for consumption of those goods within the same Member State, so long as there has been no prior assessment of the outstanding duty.

55. So it seems the Upper Tribunal considered that, even if not inherent on face of Article 7(2), the Directive should be interpreted as anticipating that there could be more than one release for consumption, and therefore more than one excise duty point, in respect of the same goods. Therefore, by permitting more than one excise duty point to arise on the same goods, the UK Regulations do not derogate from the Directive.

56. Therefore, only the less strict test of proportionality for national legislation, as set out at §32 above, should be applied to the UK Regulations at issue in this appeal.

57. I now move on to apply the test of proportionality. That requires me to consider the objective of the Directive and Regulations, in order to decide whether the effect of the Directive is manifestly inappropriate, or in the case of the Regulations, whether the effect of the Regulations was manifestly disproportionate, to that objective.

What was the objective of the legislation – imposition of excuse duty?

58. The appellant's position was that one of the objectives of the Directive, and therefore of the UK's implementing regulations, was to assess excise duty on goods which were found to have been released for consumption in the member state. Mr Firth was adamant that it was irrelevant whether or not the assessment of the duty was likely to be paid or not: he considered the likely prospects of payment of the excise duty irrelevant to the proportionality of the legislation. His position was that maximising payment of the duty was no part of what the Upper Tribunal had said in *B&M Retail* nor any part of HMRC's policy.

59. In support of this, he also pointed out that in [144] of the *B&M* decision, the Upper Tribunal indicated that the Regulations might be wrong in referring to whether excise duty was 'paid' in Reg 6(1)(b) rather than 'assessed' because the Directive used the word 'levied'.

60. However, as Mr Firth said elsewhere, HMRC's policy is not relevant to the interpretation of either the Directive or the Regulations, and I find that the Upper Tribunal did refer to payment of duty as being an objective. At [115] the Upper Tribunal said:

> [115] We accept that the ECJ's reasoning [in *Gross*] here supports the purpose behind both the 1992 Directive and the 2008 Directive, namely that it is the duty of the 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.....

61. And at [149] the Upper Tribunal said:

> ...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....

62. I also note that in *Van De Waters* the CJEU said:

> [41] Lastly, it should be noted that, while [the original Directive] does not specify the person liable to pay the duty chargeable, it follows from the scheme of the Directive, ...that the national authorities must in any event ensure that the tax debt is in fact collected.
>
> (my emphasis)

63. In conclusion, the object of the Directive and Regulations was to assess and collect excise duty on excise goods in free circulation in a member State. I reject the appellant's case that the objective was merely the assessment of the tax. Assessment is largely pointless without collection. However, I accept that double taxation was no part of the objective of the Directive or Regulations. While again not expressly stated, it is implicit.

What was the objective of the legislation – assessment close to domestic origin of goods?

64. The appellant also claimed that one of the objectives of the Directive was to assess liability to excise duty as close to the domestic source of the goods as possible. It did not rely on this argument as an essential element to its case, describing it more as a 'fall-back' option.

65. Looking at this claim in more detail, the appellant's case was that originally what is now Article 7(2)(a), (c) and (d) were the only specified releases for consumption and they all deal with the origin of the goods in the UK (import, production, and departure from duty suspension arrangement), and (b) was only added as an afterthought (after the *Van de Waters* decision).

66. I do not find this convincing. While 7(2)(b) was added later, it was listed above (c) and (d) and without any indication that it was merely to apply as a default position where the excise goods had not been taxed under (a), (c) or (d). Moreover, it is fallacious to say that, even as first enacted, what is now Article 7(2) was concerned with assessing excise duty as close to the excise goods' origin as possible: on the contrary, 7(2)(a) assessed a departure from a duty suspension arrangement, when it is obvious that to enter a duty suspension arrangement in any Member State, goods first have to be produced or imported. So the Directive's primary, or at least first mentioned, release from consumption was an event which was not as close to the domestic origin of the goods as possible.

67. Lastly, such an objective would in some cases conflict with what the CJEU and Upper Tribunal have found the objective of the Directive to be, namely, the assessment *and* payment of excise duty. And that is because the domestic origin of excise goods could be a straw company or missing trader: an assessment could be made against such a company but there is no prospect of it ever being paid. Indeed, the CJEU has stated in *Gross* at §26 (see §53 above) that the Directive was not to be interpreted as taxing only the first holder of the goods because that would prejudice the collection of tax.

68. My view is that one of the main objectives of Article 7 of the Directive, and the objective at the root of the legislation at issue in this appeal, was the assessment and collection of excise duty where excisable goods enter into free circulation in a member state. While it follows from the references to production, importation and release from duty suspension, as well as from logic, that there is some preference to tax excise goods at the first point they enter into circulation, the CJEU has effectively stated (§26 *Gross)* that the need the objective of tax collection is paramount. So any a preference in the Directive for taxation as close to source as possible is at best a subsidiary objective to assessment and collection of the excise duty.

What is the effect of the Directive and Regulations?

69. As I have said at §41 above, the parties were not entirely agreed about the effect of the Upper Tribunal's decision in *B&M.*

70. Ms Barnes considered that the effect of the legislation at issue was that there could be multiple releases for consumption and therefore multiple excise duty points at the same time. Mr Firth's preferred reading was that the Upper Tribunal ruled that HMRC could only assess an excise duty point if they were unable to establish when an earlier excise duty point had occurred. His view was that this is what the Upper Tribunal ruled at [145] when it said:

> '...Regulation 6(1)(b) is intended to apply in circumstances where goods in respect of which excise duty has not been paid are being held but it has not been possible to establish an excise duty point at any earlier point in time....

71. His view seemed to be that the effect of *B&M Retail* was that the assessment on the appellant would only be a good assessment up until the point that an earlier excise duty point was identified. In his view, the assessment would be a transient or temporary one that would automatically cease to be of effect if an earlier duty point was identified.

72. Needless to say, Ms Barnes for HMRC did not agree. She considered that other sections of the *B&M* decision made it clear that the Upper Tribunal merely meant that HMRC had the discretion to cancel the assessment of the taxpayer if an earlier excise duty point was established: the excise duty point triggered by the taxpayer's holding of the goods would not be extinguished by the establishment of an earlier duty point. Multiple duty points could co-exist.

73. Logic is more with HMRC. Liability to tax does not merely arise when HMRC are able to identify it: liability to tax arises when the conditions for liability specified in the legislation occur. While there might be a question whether there is noise if there is nothing in the vicinity with ears to hear it, it is quite clear that a tax liability will exist when the circumstances prescribed in the legislation take place, whether or not HMRC is aware of it.

74. Put another way, whether or not HMRC are able to identify the earlier duty points, they must exist. If there has been an importation, or production, or release from duty suspension, of excisable goods, then that gives rise to excise duty whether or not HMRC know about it and can identify when it took place. Logically it follows that the mere identification of such earlier excise duty point has no relevance to the existence of any subsequent excise duty point.

75. Liability to tax does not come into and go out of existence just because it is perceived: the logic of the Upper Tribunal's interpretation of the legislation is that a person who takes holds of non-duty paid excisable goods in the UK has created a duty point, even though there must have been at least one earlier duty point in respect of those same goods. That earlier duty point exists even if HMRC cannot identify when and where it occurred nor the person liable to pay it: that duty point therefore it co-exists with the later duty point. Why should that later duty point cease to be a duty point merely because HMRC discover information which allows them to identify the earlier duty point(s)?

76. But it is not merely a question of logic. When looked at as a whole, it is clear that the Upper Tribunal in *B&M* did not consider that the identification of any earlier duty point would automatically extinguish any later duty point.

77. In particular, their conclusion to the appeal was set out in their paragraph [157] (see §39 above) in which they saw it merely as a question of HMRC's discretion: the later excise duty point would still exist but HMRC might, as a matter of policy, decide

to repay the excise duty. This was also made clear in [152] when the Upper Tribunal clearly contemplated the simultaneous existence of multiple duty points in respect of the same goods:

> '....who should be assessed out of the numerous persons who HMRC may discover hand handled the goods in the supply chain while the duty remained unpaid.'

78. My conclusion is that the legislation, both EU and UK, as interpreted by the Upper Tribunal, envisages multiple duty points. Those excise duty points arise on every occasion any of the conditions in Article 7(2)((a)-(d) (or Regulation 6(1)(a)-(d)) occur. Those conditions can only be met at a time when excise duty is unpaid. An assessment to excise duty of any one of those excise duty points does not extinguish the other duty points nor does the identification of an earlier duty point extinguish any later duty points that have already arisen. Obviously, a holding of excise goods after payment (or possibly assessment) of the duty does not create an excise duty point.

79. HMRC are not bound by legislation to assess the earliest identified duty point: to the extent that it is their current policy to do so that is an exercise of discretion conferred on them by the legislation, and is not required of them by the legislation.

80. Assuming that I am right to interpret what was said in *B&M Retail* in this way, is the legislation proportionate?

Are multiple excise duty points disproportionate?

81. The appellant's case is that, if that is the correct representation of the Upper Tribunal ruling in *B&M*, then the legislation as interpreted by the Upper Tribunal is disproportionate. It says it results in multiple taxation. It complains that a subsequent duty point would exist and give rise to liability even if an earlier duty point on the same goods was assessed, or even worse, if the earlier duty point was both assessed and paid.

82. HMRC's position was that the effect of the ruling in *B&M* was that HMRC could assess someone in the position of the appellant in this case, but if they later discovered the identity of an earlier holder of the goods, then HMRC could assess that other person instead. And that person would be unable (on HMRC's view of the law) to challenge its assessment on the basis that a later holder of the goods (like the appellant) had been assessed first in time on the same goods. HMRC's view was that there could be successive assessments for the same duty, even though only one assessment could exist at any point in time, and only one assessment could be enforced.

83. The appellant's position is that this state of affairs is disproportionate. It says it is disproportionate as it results in more than one person being liable for the same duty at the same time: potentially it even results in double taxation (or more).

84. The law would be more proportionate, says the appellant, if it had provided only for one release for consumption and one excise duty point on the same goods. While

it accepts that what the CJEU in *Van De Waters* is good law, it says more proportionate legislation would have provided for there to be only a release for consumption by a holder of the excise goods if that person is unable to identify an earlier holder of the excise goods. Such a rule would not give rise to double taxation, nor permit HMRC a discretion as to who to assess. It would also result in an assessment as close to the source of the goods as can be identified.

85. So I move on to consider whether my interpretation of the *B&M* decision, as explained above, does give rise to double taxation, and if it does not, whether it is disproportionate in any event (as the appellant says) because it gives rise to joint liability and legal uncertainty.

Is there double taxation?

86. It was assumed in the hearing that double taxation would not be proportionate and I agree. Collecting more tax than is due is a manifestly inappropriate and disproportionate method of collecting tax that is due.

87. But I do not agree that the Upper Tribunal's interpretation of the legislation does lead to multiple taxation. While it is true that neither the Directive nor Regulations state explicitly that the excise duty can only be collected once, it is implicit. It is implicit because the Directive's very objective is to collect tax that is owing: it is not to collect amounts of money that are not owing. Very clear and unambiguous wording would be needed to enact law that allowed double taxation and where there is no such wording, double taxation should not be read in.

88. I would say it was particularly clear that double taxation was not intended when the wording of the legislation at issue is considered. Article 7(2)(b) only applies to goods on which 'excise duty has not been levied', so once the duty is levied, Art 7(2)(b) no longer applies to impose duty. The same point can be made in respect of the Regulations where paragraph 6(1)(b) only applies to goods on which excise duty has not been 'paid, relieved, remitted or deferred', so once excise duty is levied, paragraph 6(1)(b) no longer applies. While these mirror provisions do not specifically prevent enforcement of multiple excise duty points which arose before any excise duty was paid, it strongly suggests that the objective of the legislation was the payment but once of excise duty on excisable goods.

89. While it is true, as I have said, that the Directive and Regulations, as interpreted by the Upper Tribunal, do permit multiple excise duty points, multiple excise duty points do not inevitably lead to multiple taxation. And as multiple taxation cannot have been intended, it must be the case here that the Directive and Regulations can create multiple duty points without creating multiple taxation. That tax could only be collected once is so obvious a proposition that it did not need to be stated. Nevertheless, it was stated in the *B&M* decision, as the Upper Tribunal said at [105] in regards the *Van de Waters* case that

> 'it is also implicit in the reasoning that there can be no more than one assessment to duty in respect of the same goods'.

What the Upper Tribunal said in the second half of [157] was also on the assumption that there could only be one assessment in respect of the same goods.

Is it only policy that prevents double taxation?

90. HMRC had a policy which implicitly assumed that there should be no double taxation on the same excise goods. The policy was recorded in the *B&M* decison as follows:

> [69] HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before them to assess any other person as liable for excise duty by virtue of any earlier excise duty point that may have occurred....

91. Mr Firth's point was that to the extent that the Upper Tribunal made it clear that the excise duty could not be collected more than once by HMRC, they did so in reliance on HMRC's stated policy. It is his position that the Tribunal's interpretation of the *legislation* was that it permitted double taxation. Legislation that permits double taxation is disproportionate.

92. Disproportionate legislation cannot be rectified by a national authorities' administrative policy. This is made plain in cases such as *French Republic* C-296/01 at [54] where the CJEU said:

> ....Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations flowing from Community law since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights and obligations in a field governed by that law....

93. While I do not doubt that the appellant is right to say that administrative practices cannot make disproportionate legislation proportionate, I do not accept that that is what has happened here. It is true that the Upper Tribunal says at [150] that

> We accept that, if the correct interpretation of the 2008 Directive is that there can be more than one release for consumption in respect of the same goods, then which of the various persons who may have had some involvement with the goods is to be assessed for the duty in respect of those goods will in many cases depend on the exercise of discretion on the part of HMRC. In relation to their policy in this regard, ...HMRC appear to exercise their power to assess on the basis that only one assessment can be made in respect of the same goods. That in our view is consistent with our interpretation of the 2008 Directive and the policy behind it.....

94. And it is true that this passage does appear to support the appellant's position that it is only HMRC's policy which prevents double taxation under the UK legislation,

but it does not actually say that. While it does say it is HMRC's policy is only to make one assessment, it does not say that more than one assessment (or at least, more than one payment) would be permitted by the legislation.

95. While the Upper Tribunal at [152] does see the manner in which the UK implemented the Directive as conferring on HMRC a wide discretion in choosing (in accordance with their policy) who to assess, and by implication accepting that that discretion could have been but was not limited by legislation, nowhere do they suggest that the legislation permits double taxation. Indeed, taking into account what they say at [105] about the *Van De Waters* judgement (cited at §89 above), they must have given the judgment on the assumption that double taxation is not permitted by the legislation.

96. For the reasons given above, I consider that the correct interpretation of the Directive and Regulations, and the interpretation that was given to it by the Upper Tribunal in the *B&M* decision, is that the excise duty can only be collected once. There is therefore no double taxation, and the legislation is not manifestly disproportionate on this basis.

97. Nevertheless, I accept that it does appear to be the position that the Upper Tribunal anticipated that it would be possible to have successive assessments for the same duty. They anticipated at [157] not that more than one assessment for the same duty could exist at the same time, but that it would be possible for one assessment to be discharged and a new one imposed for the same duty on a different trader. This does not amount to double taxation: on the contrary it would not be double taxation to have more than one assessment, as long as only one was paid/enforced. But I go on to consider whether successive assessments are proportionate when considering the appellant's case on joint liability and legal certainty.

Are multiple excise duty points disproportionate because they are unconditional?

98. Mr Firth said that even if it was proportionate to have multiple duty points, it was disproportionate if they were permanent and unconditional. This point is related to point that he made at §71: the case I considered at §§69-79 was whether the legislation as interpreted by the Upper Tribunal provided for a duty point on a holder of goods under Article 6(1)(b) (or Regulation 7(2)(b)) to cease at the point in time (if any) when HMRC were able to identify an earlier duty point in respect of the same goods. I concluded that Mr Firth's interpretation was wrong, and more than one excise duty point could exist at the same time. Mr Firth's point following on from that, therefore, was that he considered the legislation disproportionate because it gave rise to this joint liability. The legislation as I understand the Upper Tribunal to have interpreted it meant that the same goods could give rise to more than one excise duty point and the possibility that at the same time more than one person could have the liability to pay the duty.

99. As I understand it, this is not the same point as his complaint about double taxation. This case is that it is disproportionate to have more than one person liable to pay the excise duty, even if the duty can be assessed or, at the least, collected, only

once. In other words, the appellant's argument is that it is disproportionate to permit the tax authorities the choice, of the various persons liable to pay the duty, of whom to assess. It is the appellant's position that the legislation would be more proportionate if it required the tax authority to assess the first excise duty point which they can identify: but as the Upper Tribunal recognised at [152], the legislation actually permits HMRC the choice of which excise duty point to assess.

100. I agree that the effect of multiple duty points is to increase the numbers of person potentially liable to pay the duty: its effect is therefore not multiple taxation, but simply to increase the likelihood of the duty being paid once. I do not see anything necessarily disproportionate (in the right circumstances) in making more than one person potentially liable for the same duty: it simply increases the likelihood of collection.

101. The Directive itself envisages that there can be joint and several liability for the same excise duty debt (see Article 8(2)), so there is nothing repugnant in having more than one excise duty point for the same duty. In neither instance is the duty required to be paid more than once. Indeed, in reality, the effect of multiple duty points is much the same as joint and several liability for the same excise duty.

102.The question is whether it is proportionate to impose some type of joint and several liability, via multiple duty points, in the particular circumstances. Those circumstances are that the persons made liable are all persons who have triggered a release for consumption. They have become of the holder of excisable goods outside a duty suspension arrangement on which duty has not been paid: they ought therefore not be surprised to find themselves liable to pay that duty. Persons purchasing excisable goods, who do not wish to be liable to pay the duty on them, ought to protect themselves against liability by ensuring that they only became a holder of excisable goods on which duty had already been paid.

103.I would say that that is not only obviously true of retailers and wholesalers, but it is true of consumers too. If they purchase from reputable retailers and pay full price, it is considerably more likely that the goods are duty paid and, indeed, it is probably an implied term of the contract that the goods are duty paid: but if they purchase from a 'friend of a friend' at a discount on normal prices, it is likely the goods are non-duty paid and they ought to know that and should not be surprised if held accountable for the duty.

104.The appellant's suggested rule would see HMRC only able to assess the first identified duty point on the goods in question. Not only would that mean that in any particular case, HMRC might be constrained only to assess a straw company or missing trader from whom there is no hope of collection, it would mean that in general there would be no incentive on wholesalers and retailers to check that they were only purchasing duty paid alcohol, and the illicit trade in non-duty paid alcohol would continue to flourish. This is particularly the case if the appellant is right to say (as it does in the third section 'holding') that the first person identified in a supply chain is a holder of the goods, whether or not they have physical possession of the goods.

105.This would not be a more proportionate method of attaining the objective of the Directive: it would be a far less effective method of collecting the excise duty.

106.In conclusion, I do not consider multiple duty points disproportionate because they are permanent, and do not cease to exist when an earlier duty point is identified, effectively giving the taxing authority some discretion in who is assessed. On the contrary, legislation which creates a release for consumption every time a person becomes a holder of excisable goods on which duty has not been paid and which are not within a duty suspension regime is legislation that is more likely to achieve the objective of assessment and collection of excise duty as it (1) increases the number of persons liable to pay and (2) acts as an incentive to ensure retailers and wholesalers are vigilant to ensure they do not become the holder of excise goods on which duty should have been but has not been paid; moreover, it remains proportionate because liability only extends to those who chose to hold goods on which duty should have been, but was not, already paid, and it does not result in multiple taxation.

107.The appellant's last criticism of the legislation as interpreted by the Upper Tribunal was that it resulted in a lack of legal certainty.

Are multiple duty points unlawful because they lack legal certainty?

108. Its case on this is that the multiple duty points mean that the appellant has no certainty as to its liability: if more than one person can be liable at the same time for the same tax, yet the tax can only be assessed/paid once, the appellant has no certainty as to the full extent of its liability.

109.I consider this proposition by looking at the position before there has been any assessment for the duty and after there has been an assessment,.

110.Before there has been any assessment, it seems to me that the legislation as interpreted by the Upper Tribunal gives legal certainty to a person who becomes a holder of excise goods which are duty unpaid: and that certainty is that they are liable and remain liable to pay the excise duty unless and until the goods are duty paid or the assessment is time barred.

111.They have the uncertainty of not knowing whether or not the assessment will be raised, but that is true of anyone who has a tax liability that they have not declared.

112.Taking the position after there has been an assessment of duty on one of the multiple excise duty points arising on the goods on the scenario envisaged in *B&M*, the implication of what the Upper Tribunal says at [157] of the *B&M* decision (cited at §39 above) is that the multiple excise duty points continue to exist and remain liable to assessment. This is because the Upper Tribunal indicates that HMRC could assess an earlier duty point, despite having already assessed a later duty point and even despite having received payment of that assessment, subject of course to discharging the original assessment and repaying the tax:

> [157].... This conclusion is subject to HMRC's power to reimburse B&M the amount of the assessment, in accordance with their stated

> policy, should it later be established through evidence that an assessment can be made in respect of an excise duty point which arose prior to B&M holding the goods.

113. The implications of the Upper Tribunal decision are that a person who becomes a holder of non-duty paid excise goods remains at risk from an assessment until an assessment is time barred, even if another person has been assessed for, or even paid, the excise duty. The appellant's position is that that means the law lacks certainty.

114. I agree that this appears to go beyond joint and several liability for the same debt, which the Directive clearly contemplates: because a person jointly and severally liable for a debt has the legal certainty that once the debt is paid by another, their own liability (to HMRC at least) has ceased. That certainty would not exist in the situation anticipated by the Upper Tribunal in [157].

115. Nevertheless, that does not mean that the legislation as interpreted by the Upper Tribunal offends against legal certainty. Firstly, what the Upper Tribunal said appears to be limited to a power to assess an *earlier* duty point: the Upper Tribunal did not appear to consider it possible for HMRC to discharge an assessment on an earlier holder of the goods in favour of assessing a later holder of the goods.

116. Does this limited ability to make a further assessment mean there is a lack of legal certainty? It gives a person who holds duty unpaid excisable goods outside suspension the certainty that they remain liable to the duty until it is time barred or unless a person who held the goods before they did is assessed. That appears consistent with the Directive which required the duty to be paid when they left suspension and (as I have said) therefore gives effect to the weak preference, subject to issues of assessment and collection, to assess closer to the point that the goods leave duty suspension.

117. I accept it might offend against legal certainty if the legislation permitted HMRC to assess a later holder the goods, having already assessed an earlier holder of the goods, but the Upper Tribunal do not suggest that that is the case.

118. Assuming I am right to say it does not offend against legal certainty to permit HMRC to make a second assessment for the same duty arising on an earlier duty point, as long as they remit the duty on the original assessment for the same duty arising on a later duty point, is that limit on the ability to make a successive assessment a matter of policy or legislation? I have already agreed with Mr Firth's point that policy can't rectify legislation which breaches fundamental EU principles.

119. But is such legal certainty the product of HMRC's policy, or is it implicit in the legislation? The answer seems to be that the Upper Tribunal's interpretation of the law was that only an earlier holder of the goods remains at risk of an assessment where an assessment is made on a later holder of the goods: see [145] and [155]. It is not therefore merely a matter of policy. Therefore, I consider that the EU and UK legislation, as interpreted by the Upper Tribunal, is not a breach of the principle of legal certainty.

Conclusion

120.It follows from what I have said above that the legislation which, as I understand it to have been interpreted by the Upper Tribunal, provides for unconditional multiple releases for consumption and multiple excise duty points, without double taxation, is an appropriate and proportionate method of ensuring that the objective of assessment and collection of duty on non-paid duty paid goods in free circulation is met. It gives sufficient legal certainty. There is therefore nothing to refer to the CJEU.

121.The appellant's suggestion that duty should only be assessed on the earliest identifiable duty point is not a better way of meeting that objective as it would lead to fewer assessments and, in particular, less collection, of duty, for the reasons given at §106. Even if the test were, which it is not, whether the legislation is the 'least detrimental' method of achieving the objective, it would not fail this test as the appellant's proposed alternative is not an alternative at all as it would be significantly less effective (for the reasons given at §106) in achieving the objective of assessment and collection of the duty.

122.I consider that the EU and UK legislation at issue to be proportionate whichever definition of 'holding' is right. Nevertheless, I note that on the appellant's definition of 'holding' which is that it includes someone with legal ownership but no physical possession, the first identified excise duty point is likely to arise on the first identified owner of the goods. Where the supply chain involves non duty paid goods outside a duty suspension regime, as on the facts of this case, the first identified owner of the goods might well be a straw company or missing trader. Therefore, if the legislation on duty points was to be interpreted as the appellant suggests, so that only the first identified duty point could be assessed, it would make assessment and collection of duty much less likely and the law would be unlikely to provide much of a disincentive to trading in duty unpaid excisable goods.

123.I find that both the EU and UK legislation at issue, as I understand it to have been interpreted by the Upper Tribunal in *B&M Retail*, is a proportionate and legally certain means of achieving the objective of assessment and collection of duty on non-duty paid goods in free circulation in a member state both generally and where the person assessed can identify their supplier.

The second issue: the jurisdiction issue

124.This was a relatively short point. Assuming that multiple duty points are proportionate, and assuming that I am right to say, as I do at §§69-79 that the legislation confers on HMRC a discretion as to which duty point to assess, the appellant's position is that it can challenge the assessment on it on the basis that either HMRC's policy on which duty point to assess is wrong, or has been misapplied.

125.HMRC rely on what was said at [152-153] by the Upper Tribunal in *B&M Retail* to the effect that the policy decision to assess the appellant rather than someone else could only be challenged by way of judicial review.

126. The appellant's position was that what the Upper Tribunal said here on this was both wrong and 'obiter'. 'Obiter' means it was merely a comment in passing and not a necessary step in the reasoning of their decision. Obiter comments by a superior court are not binding.

127. Logically, I should consider whether what they said was obiter first, because if it was not, I do not have jurisdiction to consider whether it was right or wrong and I must simply apply it. However, I agree it was obiter: the Upper Tribunal was ruling only on the preliminary issue of whether or not there could be multiple duty points. It was not asked to rule on whether or not the Tribunal had jurisdiction to consider HMRC's exercise of policy in assessing the appellant rather than someone else. What it said on that matter was therefore necessarily obiter.

128. Nevertheless, this Tribunal should accord obiter comments of a superior court respect made after full argument: I expressed the view in *Hilden Park (no 2)* [2017] UKFTT 217 (TC) at §75 that the FTT should follow them unless they are obviously wrong. Having said that, I accept that in this instance, it does not appear that the Upper Tribunal heard any argument on the point raised by the appellant, and that, therefore, it is open to me to consider the matter afresh. And I proceed to do so.

The Statutory Jurisdiction of the Tribunal

129. The appellant's case rests on s 16 Finance Act 1994. That is the provision which gives this Tribunal jurisdiction to hear this appeal and other appeals against different types of HMRC decisions on excise duty. It relevantly provided as follows:

> (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the Tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at, to do one or more of the following, that is to say –
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate, of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.
>
> (5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.
>
> (my emphasis)

130. It was accepted by both parties that the decision under appeal was not an ancillary decision (or a review of an ancillary decision). It did not fall into s 16(4). It logically followed, therefore, that it did fall into s 16(5) as a decision other than a decision within s 16(4).

131. What powers does this Tribunal have on an appeal against such an 'other' decision and do they include power to review an excise of discretion by HMRC? The appellant accepts as correct the decisions in such cases as *Hok* [2012] UKUT 363 (TCC), *Noor* [2013] UKUT 71 (TCC) and *BT Pension Trustees* [2014] EWCA Civ 23 where it was stated that the Tribunal has no inherent jurisdiction and would only have supervisory jurisdiction over an exercise of discretion by HMRC where Parliament chose to confer it on the Tribunal. The appellant's point is that (it says) in this case such jurisdiction has been expressly conferred on the tribunal. The appellant's case was that, because s 16(5) stated that the Tribunal's powers on appeals within s 16(5) 'shall also include' other powers, a necessary implication was that the Tribunal's powers on s 16(5) appeals included all those listed powers conferred in the preceding sub-section (4). Therefore, as s16(4) gave the Tribunal supervisory jurisdiction over ancillary decisions, s 16(5) gave the Tribunal supervisory jurisdiction over HMRC's decisions which were not ancillary decisions.

132. In other words, if I am right to say (see §106) that it was lawful for HMRC to have and apply a policy on whom to assess where there were multiple excise duty points, the appellant's case was that this Tribunal had expressly been given jurisdiction on an appeal against the assessment to decide whether the policy was lawful, and lawfully and reasonably applied to the appellant.

133. In other words, it was the appellant's position that this Tribunal has jurisdiction to discharge the assessment on the appellant if the appellant could show that there was an earlier identified duty point on the same goods, because HMRC's policy (see §90 citing [69] of *B&M*) was to assess the first identified duty points on the goods. Neither the appellant nor HMRC necessarily accepted that what the Upper Tribunal said at [69] about HMRC's policy was complete and correct: but I was not asked to decide what HMRC's policy actually was at the relevant time. The question was whether in principle I could discharge the assessment if I found it to have been made in breach of the policy.

Interpretation of s 16(5)

134. In my view, s 16(5) is somewhat ambiguous. It does not expressly confer supervisory jurisdiction but seems to imply it by use of the words 'shall also include'. Ms Barnes' point is that those words mean no more than the Tribunal has the powers (but not jurisdiction) conferred by s 16(4), but, as Mr Firth points out, that is scarcely an explanation because the powers conferred by s 16(4) can only be exercised where HMRC's exercise of discretion is found to be unreasonable (see, for example, s 16(4)(c)).

135. Nevertheless, it is possible to read the words 'shall also include' as expressing no more than the desire to make it clear that the limited jurisdiction over s 16(4)

decisions does not apply to decisions within s 16(5), because the s 16(5) jurisdiction is full appellate. It seems odd that Parliament would have intended the Tribunal to have jurisdiction to consider both (a) whether an assessment is right as a matter of tax law and (b) whether as a matter of public law HMRC were right to impose the assessment. Certainly, one would have expected, if that was the intent, for more express wording than 'shall also include' to be used.

136. So, because the provision is ambiguous, I need to consider Parliament's intention in order to discern how it was intended to be read. The question is whether Parliament intended the Tribunal to have the power to quash an assessment because the Tribunal did not consider HMRC had exercised its discretion correctly, as well as having power to consider whether the assessment was right as a matter of tax law.

137. The main point it seems to me is that HMRC's discretion over an assessment only exists where the taxpayer is liable to the tax as a matter of tax law. In other words, HMRC's discretion is a discretion *not* to assess. Because if the taxpayer was not liable to the tax as a matter of tax law, HMRC have no discretion: they cannot make a valid assessment. And the power *not* to assess (or to discharge a valid assessment already made) is a general power that HMRC has under its care and management powers. And it is well-established (eg see *BT Pension Trustees, Hok* and *Noor)* that the Tribunal was not intended by Parliament to have jurisdiction over the exercise of that general discretion not to assess.

138. While Parliament has chosen to confer on the Tribunal in some instances a limited supervisory role similar to (but more limited than) that exercised by the administrative court over all discretionary decisions of public bodies, it has only chosen to do so where the HMRC decisions concerned involve the exercise of (or refusal to exercise) a particular (rather than a general) discretion. One example is restoration decisions after a seizure of non-duty paid goods, which are ancillary decisions which fall within s 16(4).

139. It therefore seems unlikely that s 16(5) was intended to be read as giving the Tribunal the right to consider whether or not an assessment to excise duty was lawful in the public law sense, because that would involve giving the Tribunal supervisory jurisdiction over HMRC's general care and management powers (which include the power not to assess tax lawfully due) rather than merely over a specific and limited power (such as to restore goods which are seized).

140. It is also unusual for the Tribunal to have an appellate as well as supervisory jurisdiction over the same decision. But it is not without precedent: the Tribunal has full appellate jurisdiction over penalties imposed under Sch 55 of FA 2009 and in addition is expressly given an expanded kind of supervisory jurisdiction over HMRC's decision not to exercise its specific power to reduce the penalty for special circumstances (§22). But the same point applies as in the previous paragraph: not only was the supervisory jurisdiction in Sch 55 clearly and expressly given, it was given over a specific and limited power given to HMRC. The Tribunal was given no power to supervise HMRC's general care and management powers.

141.My conclusion is that, despite the ambiguous wording, Parliament intended the Tribunal to have full appellate jurisdiction over 'other decisions' such as the assessment in this case, but did not intend it to exercise supervision of HMRC's decision whether or not to make (or discharge) an assessment otherwise correct in law.

142.I was referred to the following two paragraphs in *British-American Tobacco (Holdings) Ltd* [2017] UKFTT 190 (TC):

> [518] As I have said, it is common ground that the jurisdiction of this Tribunal in the present appeal is conferred by s 16(5) FA 94. It will be seen from the use of the word 'also' in s 16(5) that this provision confers jurisdiction which is additional to that found in s 16(4). I therefore have jurisdiction to quash or vary the decision of HMRC and to substitute my own decision.
>
> [519]....I can quash or vary HMRC's decision and substitute my own decision if I disagree with HMRC's decision, regardless of whether my grounds for disagreement fall within *Wednesbury* principles. I therefore conclude that I have a full merits-based jurisdiction to determine the issues before me.

143. I do not consider that these paragraphs support either party's position on this. Firstly, the FTT in that case was clearly not addressed with argument on the point as the parties were agreed. Secondly, the question was not whether the Tribunal could allow the appeal if it thought the assessment was unreasonable in the public law meaning of the word, but whether the Tribunal had jurisdiction to discharge the assessment if it thought it was wrong. I agree with its conclusion that it had full appellate jurisdiction over a decision within s 16(5). It made no comment on the issue arising here: and I have decided that issue as set out in §141.

The third issue: the meaning of 'holding'

144.I explained above the importance of the meaning of 'holding' in this appeal. It is because the appellant's case is that (i) the law is that it is only the first identified duty point which can be assessed (ii) and even if that is wrong, it says HMRC's policy was to assess the first identified duty point, and it says that HMRC's failure to discharge the assessment of the appellant on identification of an earlier duty point is within the jurisdiction of the Tribunal.

145.The assumed facts are that neither party can identify a person who physically held the goods prior to the appellant, but that the person who owned the goods and supplied them to the appellant can be identified. Is that person a holder of the excise goods? If so, a duty point earlier than the one occasioned by the appellant buying the goods and taking possession of them, can be identified. So the crucial question here was whether a person who owned the goods, and who has the power to direct them to

be delivered to its customer, but who does not have physical possession of the goods, is 'holding' the goods within the meaning of the legislation.

146. However, I have already said that I do not accept that the legislation as interpreted by the Upper Tribunal in the *B&M* decision requires HMRC to assess the first identified duty point. See §79. I have also already said that HMRC's policy on who to assess (whatever it is) is not within the jurisdiction of the Tribunal (see §141). So this third preliminary issue has therefore become redundant. Nevertheless, it makes sense to record what was said on the matter in case this preliminary decision is appealed.

147. The word 'holding' is used a number of times in the Directive and Regulations. The appellant's position is the quite logical one that the word was intended to have the same meaning throughout the same piece of legislation. Its case was also that the meaning of 'holding' was a wide one and would in particular include the owner of the goods as a holder of the goods. They relied on a number of cases for this proposition, including *Taylor and Wood v R* [2013] EWCA Crim 1151.

The article 33 cases on the meaning of 'holding'

148. *Taylor and Wood* concerned a different provision of the same Directive (albeit an earlier version of the same directive) as in issue in this case. While the provision at issue in this case imposed excise duty on goods present in one member state where there was no evidence of earlier payment of excise duty in another member state, the provision at issue in *Taylor and Wood* (now Article 33) imposed excise duty on goods present in one member state where excise duty had been paid in another member state. It was the same provision as the one in *Gross* mentioned above.

149. *Taylor and Wood* concerned whether a confiscation order ought to be made under the Proceeds of Crime Act ('POCA') and it followed that the court had to determine whether the persons convicted of the smuggling were the persons liable to tax under what is now Article 33 as persons 'holding' the goods. What is now Art 33(3) provided that the person liable to excise duty was:

> Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State.....

150. The facts were a little complicated, but the two defendants each owned and controlled a company. With full knowledge of the criminal nature of the enterprise on the part of both defendants, one of the defendant's companies contracted with the other (a freight forwarder) to transport goods (textiles with an illicit load of hidden cigarettes) from Belgium to the UK. The actual transport was sub-contracted to an innocent road haulier, who sub-sub-contracted to another innocent road haulier.

151. The load was delivered to premises in the UK owned by one of the defendants. The excise duty point was taken to be when the goods entered the UK and the

question addressed by the court was who was 'holding' the goods at that time. The court said:

> [29] 'holding' is not defined....It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised.....But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently....

152. The court decided that the two innocent road haulier companies, the second of which was in actual possession of the goods when they entered the country, did not hold the cigarettes because neither had any knowledge that the cargo consisted of cigarettes; 'that important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point' . It went on to decide that the two defendants who were co-conspirators were each holding the goods:

> [31] To seek to impose liability to pay duty [on the innocent carriers] who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such questions, because they were the persons, who at the excise duty point, were exercising de facto and legal control over the cigarettes. In short responsibility for the goods carries responsibility for paying the duty'
>
> [39] ...both the language and purpose of the [relevant legislation] strongly support the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents ....rather than upon the appellants, would no more promote the objectives of the Directive than those of the Regulations.

153.In the more recent case of *R v Tatham* [2014] EWCA Crim 226 the court of appeal ruled:

> ....'holding' ...can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising *de jure* and/or *de facto* control over the goods, whether temporarily or permanently, either directly or by acting through an agent (see *Taylor & Wood).*...
>
> There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder'....A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the 'holder'.....

154. And in the even more recent case of *McKeown, Duggan and McPolin* [2016] UKUT 479 (TCC), a case concerning assessments to duty on three HGV drivers who were each stopped on arrival in UK and found to be carrying non-excise duty paid goods which did not belong to them, the Upper Tribunal ruled:

> [65] There is no question that the Appellants had physical possession of the goods but that is neither necessary nor, by itself, enough to constitute 'holding' ....In order to be 'holding the goods' a person must be capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent.

155. The appellant's view of these cases is that they establish that actual control of the goods, knowing that they are non-duty paid, is sufficient to be 'holding' even without physical possession. Therefore, because legal ownership gives the legal owner the right to control the goods, it must follow that the person who supplied the goods at issue in this appeal to the appellant was 'holding' them. Indeed, it is an assumed fact that the appellant's supplier ordered the goods to be delivered to the appellant (§5).

156. After the hearing, the appellant asked for and received permission to make submissions on the case of *Perfect* [2017] UKUT 476 (TCC) released by the Upper Tribunal on 8 December 2017, the day after the hearing. HMRC were also given permission to make submissions on it and did so.

157. The question in that case was whether someone who knew that they carried excise goods was liable for the duty even though they did not know duty had not been paid on them. The FTT and Upper Tribunal ruled that that person was not 'holding' the goods within the meaning of Article 33 of the Directive and was not liable for the duty. In doing so, the Upper Tribunal summarised the state of authorities on 'holding' as:

> [51]... a person can 'hold' the goods for the purposes of the regulations even though he or she has no beneficial interest in them, and even though he or she may not be in physical possession of them, so long as he or she is capable of exercising de jure and/or de facto control over them, whether temporarily or permanently, either directly or through an agent....

158. While HMRC accept that 'holding' in Art 33 has this very wide meaning, they do not agree that it does so where the same word is used elsewhere in the Directive. They point out that Article 33 has no equivalent to Art 8(1)(b) which allows a person 'involved' in a holding under Article 7 to be liable for the duty, so says HMRC, it makes sense to give 'holding' in Article 33 a wider meaning than in Article 7.

159. Ms Barnes also referred me to decision of Mr Sharp and myself in *Euro Trade and Finance Ltd* [2016] UKFTT 279 (TC) where the Tribunal considered the meaning of 'holding' in Article 15 of the same Directive, which referred to 'the production, processing and holding of [duty unpaid] excise goods' taking place in a tax warehouse. The question was whether a trader in such goods, who owned the goods stored in the tax warehouse, was a holder of the goods. We said:

> [217].... the word 'holding' is the third in a sequence being 'production, processing and holding'. These words appear to refer to physical actions rather than legal actions. So 'holding' is, it seems to us, likely to be concerned with the physical possession of the goods rather than the legal ownership of them. That fits with Art 15(2) which requires duty suspended goods in effect to be physically located in a warehouse. Art 15(2) would make no sense if it was to be read as saying legal ownership of duty suspended goods 'shall take place in a tax warehouse'.

While our ultimate conclusion was to refer the matter to the CJEU (because a related question needed to be referred), the preliminary conclusion was that a person who merely owned goods stored in a tax warehouse did not 'hold' them within the meaning of Article 15.

160. What we said in that case on the meaning of holding was therefore neither the Tribunal's final decision on the meaning, nor binding on me now even if it was. Nor was what we said there given after consideration of the use of the word 'holding' in other provisions of the Directive nor (so far as I recollect) we were referred to cases such as *Taylor and Wood.*

Conclusion on meaning of 'holding' in Article 7

161. It is clear that the word 'holding' has a wide meaning where it is used in Article 33. HMRC's case is that it has a narrower meaning elsewhere in the Directive, and rely on my decision in *Euro Trade* to demonstrate this. I do not accept their position.

162. Firstly, I do not accept that what was said in *Euro Trade* was necessarily inconsistent with the line of cases on the meaning of 'holding' in Art 33 from *Taylor and Wood* down to *Perfect.* Those cases decided that the goods were 'held' by a person who had both control of them and knowledge they were duty unpaid excisable goods. Yet it seems to me that an owner of non duty paid goods stored in a tax warehouse lacks the necessary control to be 'holding' the goods under the *Taylor and Wood* test. Owners of duty unpaid goods held in a tax warehouse in duty suspense lack practical control of the goods as they are unable to remove the goods from the warehouse without the payment of duty. Therefore, they do not have the ability to freely move those duty unpaid goods, despite their legal ownership of them. That is in contrast to a situation of non-duty paid goods, held outside a tax warehouse, where the owner of the goods, albeit not necessarily in physical possession of the goods, can order them to be moved around at will.

163. Secondly, and most significantly, it seems highly unlikely to me that the authors of the Directive used the word 'holding' with the intention it should mean different things in different articles of the same Directive. It is a normal rule of statutory construction (not to mention common sense) that the same word is intended to have the same meaning in the same piece of legislation: there would have to be a very strong indication that that was not the intention for the same word to be given different meanings in the same legislation. And what HMRC say about Art 8(1)(b) (see §158) does not amount in my view to an indication that the authors of the

directive did intend to give different meanings to the same word. I can see no good reason at all why 'holding' should have had different meanings in different parts of the direction.

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

165. For these reasons, I would agree with the appellant that the word 'holding' for the purposes of Art 7 is the same as that given in the cases on Art 33.

166. Nevertheless, as I have already said, that does not conclude the preliminary issue in favour of the appellant as in answer to the first question in my view is that the legislation under which the appellant was assessed, which meant that the appellant could be assessed despite there being at least one earlier duty point, was proportionate and legally certain, and to the extent (if any) that the assessment was in breach of HMRC's policy when applying that legislation, that is a matter beyond the jurisdiction of this Tribunal.

Conclusion

167. It follows from what I have said above that I consider that the correct answers to the preliminary questions are as follows:

> (1) Neither the Regulations nor Directive, either generally or where the person assessed can identify its supplier, are incompatible with the principles of proportionality and legal certainty.
>
> (2) The FTT does not have jurisdiction to consider a challenge to a decision to assess under r 6(1)(b) of the Regulations based on its unreasonableness and/or public law principles on an appeal under Finance Act 1994 s 16(5);
>
> (3) A person who has de facto and/or legal control of the goods but who does not have physical possession of the goods and who knows that the goods are duty unpaid 'holds' the goods for the purpose of Reg 6(1)(b)/Art 7(2)(b) consistent with the definition of 'held' under Reg 33.

168. The result is that, while I agree with the appellant over issue (3), my decision on issues (1) and (2) makes it irrelevant whether the appellant's supplier triggered an earlier duty point. The preliminary issue is concluded against the appellant.

169. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 8 FEBRUARY 2018