



Neutral Citation: [2023] UKFTT 702 (TC)

Case Number: TC 08886

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/03515

*EXCISE DUTY and PENALTY – section 12 of Finance Act 1994 – Schedule 41 to Finance Act 2008 – alcohol in transit found to be without UK duty paid – seizure of goods and deemed forfeiture – ground of appeal amendments to rely on Perfect – whether HMRC failed to exercise discretion by not assessing duty on the appellant on the basis that the appellant could not have challenged seizure for not being the owner of the goods – sub-sections 16(4) and (5) FA 1994 pertain to Tribunal’s lack of general supervisory jurisdiction and appellate jurisdiction – reliance on the Perfect case – whether appellant an innocent agent – whether reasonable excuse – **appeal dismissed***

Heard on: 8 & 9 March 2022

Written submissions on 8 April 2022

Judgment date: 1 December 2022

Before

**TRIBUNAL JUDGE HEIDI POON
MEMBER IAN SHEARER**

Between

NIALL MURPHY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Colleen McCreesh, of McNamee McDonnell Solicitors

For the Respondents: Sarah Black, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Mr Niall Murphy ('the appellant') appeals against the following decisions by the respondents ('HMRC') in relation to:
2. An excise duty assessment dated 6 March 2020 in the sum of £23,560.00 (the '**Assessment**') pursuant to section 12(1A) of the Finance Act 1994 ('FA 1994'); and
3. An excise wrongdoing penalty notice dated 6 April 2020 (the '**Penalty**') in the sum of £9,895.00 pursuant to para 4(1) of Schedule 41 to the Finance Act 2008 ('**Sch 41**').
4. The issue for determination in this appeal is whether the Excise Duty Assessment and the Wrongdoing Penalty have been issued in accordance with the relevant legislation.

WITNESS EVIDENCE

5. We heard the evidence of HMRC Officer O'Hern (of HMRC), and the appellant. Each witness provided a witness statement and was cross-examined. We accept the evidence of Officer O'Hern as to matters of fact, which is largely corroborated by documentary evidence.
6. As regards Mr Murphy's evidence, we note his oral evidence was not always consistent with what he stated in his interview to the Border Force Officer Judd, and with what he stated in writing to Officer O'Hern's information request. We do not find Mr Murphy a reliable witness, and some of the inconsistencies in his evidence also cast doubt on his credibility.

LEGISLATIVE FRAMEWORK

The EU 2008 Directive on excise duty

7. Council Directive 2008/118/EC concerning the general arrangements for excise duty (the '2008 Directive') repealed Council Directive 92/12/EEC of 25 February 1992 on the general arrangement for products subject to excise duty and on the holding, movement and monitoring of such products ('the 1992 Directive'). Article 33 of the 2008 Directive (under Section 2 *Holding in another Member State*) relevantly provides:

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

For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.'

The Excise Goods (HMDP) Regulations

8. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010/593 (the 'HMDP Regulations') came into force in the UK on 1 April 2010 to implement the 2008 Directive, and regs 13 and 88, so far as relevant, provide as follows:

‘Regulation 13

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

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

- (a) making the delivery of the goods;
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held –

- (a) by a person other than a private individual; or
- (b) by a private individual (“P”), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.’

‘Regulation 88

If in relation to any excise goods that are liable to duty that has not been paid there is –

- (a) a contravention of any provision of these Regulations, or
- (b) a contravention of any condition or restriction imposed by or under these Regulations, those goods shall be liable to forfeiture.’

Condemnation procedure and deemed forfeiture

9. The Customs and Excise Management Act 1979 (‘CEMA’) consolidates predecessor enactments relating to the collection and management of the revenues of customs and excise. Section 139 of CEMA contains provisions as to detention, seizure and condemnation of goods, of which sub-ss 139(1) and (6) state:

‘(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty’s armed forces or coastguard.

[...]

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts.’

10. Schedule 3 to CEMA contains the provisions relating to forfeiture, and para 3 provides for the procedure to challenge the legality of a seizure by lodging a ‘Notice of claim’ within a statutory time limit:

‘3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.’

11. Where no timely challenge to the legality of seizure is brought, para 5 of Schedule 3 to CEMA provides as follows:

‘5. If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thin in question shall be deemed to have been duly condemned as forfeited.’

Power to assess excise duty and penalty

12. The Finance Act 1994 (‘FA 1994’) provides the Commissioners with the power to raise assessments to excise duty, and under s 12(1A) (subject to time limits provision under sub-s 12(4)), it is provided that:

‘12 Assessments to excise duty

(1A) Subject to subsection (4) [on time limits] below, where it appears to the Commissioners –

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

(b) that the amount due can be ascertained by the Commissioners,

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

[...]

(3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an amount of the duty in question due from that person may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.’

13. Section 13 to FA 1994 provides the Commissioners with the power to assess penalties:

‘13 Assessments to penalties

(1) Where any person is liable to a penalty under this chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative accordingly.

(2) An assessment under this section may be combined with an assessment under section 12 above, but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty.

[...]

(5) If an amount has been assessed as due from any person and notified in accordance with this section, then unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced, that amount shall, subject to any appeal under section 16 below, be recoverable as if it were an amount due from that person as an amount of the appropriate duty.’

Tribunal’s jurisdiction in relation to an excise duty assessment

14. The Tribunal’s jurisdiction in relation to an excise duty assessment raised under s 12 FA 1994 is under s 16 FA 1994, of which sub-sections 16(1), (4) and (5) relevantly provide:

‘(1) An appeal against a decision on a review under section 15 [...] may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

[...]

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under

this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say –

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

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

Relevant legislation in relation to an excise wrongdoing penalty

15. The excise wrongdoing penalty is levied under Schedule 41 to the Finance Act 2008 (‘FA 2008’), of which the provisions relevant to the present appeal are as follows:

(1) Paragraph 4(1)(a) provides for a penalty to be payable by a person where –

‘(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods’

(2) Paragraph 5 defines the ‘Degrees of culpability’, and under sub-para 5(4):

‘(4) P’s acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred is –

(a) “deliberate and concealed” if it is done deliberately and P makes arrangements to conceal it, and

(b) “deliberate but not concealed” if it is done deliberately but P does not make arrangements to conceal it.’

(3) Paragraph 10 provides for the potential lost revenue to be ‘an amount equal to the amount of duty due on the goods’.

(4) Paragraph 14 provides that if HMRC ‘think it right because of special circumstances, they may reduce a penalty’.

(5) Paragraph 17 states that an appeal can be against ‘a decision of HMRC that a penalty is payable’ (para 17(1)), or against ‘the amount of a penalty payable’ (para 17(2)).

(6) The Tribunal’s jurisdiction on appeal of a penalty assessment is provided under para 19 whereby –

‘(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC’s decision.

(2) On an appeal under paragraph 17(2) the tribunal may--

(a) affirm HMRC’s decision, or

(b) substitute for HMRC’s decision another decision that HMRC had power to make.

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

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

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

(7) Paragraph 20 provides for the defence of 'Reasonable excuse' in relation to 'an act or failure which is not deliberate if P satisfies HMRC or (on appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

GROUND OF APPEAL

16. The Notice of Appeal was lodged on 25 September 2020 wherein the ground of appeal is stated in terms as follows:

'The Appellant herein is not liable for this assessment. We advise that the Appellant was not the person holding the goods for the purpose of the legislation.'

17. On 18 February 2022, the appellant's Outline of Case was lodged by McNamee McDonnell Solicitors, which states:

'It is accepted by the Appellant that the recent European Court of Justice Ruling in relation to the *Perfect* case makes those persons found holding the goods liable for the tax on the goods, however the underlying power to raise an assessment by Revenue gives them a discretion as to whether such an assessment should be raised.

It is submitted on behalf of this Appellant that in the circumstances of this case, whilst Revenue may raise an assessment, they should exercise their discretion not to do so.

In relation to the penalty raised herein, it is quite clear that Mr Murphy is an entirely innocent party in this matter and pursuant to the Judgment in the Court of Appeal Decision in the case of *Perfect*, such a person should not be fixed with a wrongdoing penalty.'

PRELIMINARY MATTER

18. On 8 June 2021, and on the basis of what is stated in the Notice of Appeal, HMRC applied to the Tribunal for the appeal in respect of the Assessment to be struck out, for the reason that the appellant was the person identified as being liable to pay the duty under reg 13 of the HMDP Regulations, and in a case of deemed forfeiture pursuant to para 5 of Sch 3 to CEMA, the Tribunal has no jurisdiction to hear the appeal in relation to the excise duty assessment. The appellant never responded to the application, nor was there any correspondence from the Tribunal in relation to the strike-out application. The Hearing Notice issued by the Tribunal stated that the hearing on 8 March 2022 would be of the substantive matter.

19. As a preliminary matter, Ms Black addressed the Tribunal on the procedural issue with reference to relevant authorities¹. It is submitted that the Notice of Appeal has stated only one ground, and that relates to whether the appellant was the person holding the goods for the purpose of the legislation; and there is no reference at all to the Penalty in the Notice of Appeal.

¹ *Martland v HMRC* [2018] UKUT 178 (TCC); *BPP Holdings and others v HMRC* [2017] UKSC 55; *Outram (and another) v HMRC* [2021] UKFTT 29 (TC); *Denton v TH White Ltd* [2014] 1 WLR 3926; *Quah International v Goldman Sachs* [2015] EWHC 759 (Comm).

In contrast, the grounds of appeal mooted in the Outline of Case are different from that stated in the Notice of Appeal, and in Ms Black's submission, new grounds of appeal have been introduced without prior application or permission, namely:

- (a) That whilst the appellant is considered under the law to be the person liable as he was the one holding the goods, HMRC should exercise their discretion not to issue an assessment;
- (b) That the appellant is 'entirely innocent' and therefore should not be liable to a wrongdoing penalty on the basis of *Perfect*.

20. Furthermore, Ms Black submitted that the Outline of Case was lodged for the appellant at a late stage on 18 February 2022, when the Court of Appeal decision in *Perfect 2019*² relied upon was released on 19 March 2019, some 18 months prior to the Notice of Appeal being lodged, and the Court of Justice of the European Union ('CJEU') ruling in *HMRC v WR* (Case C-279/19) was released on 10 June 2021, some 8 months prior to the Outline of Case being served.

21. In relation to the Assessment, Ms Black submitted that the Tribunal has no jurisdiction to hear the new ground in relation to the Assessment, given that the appellant has in fact conceded to being the holder of the goods. As to the Penalty, Ms Black submitted that it is 'entirely unreasonable to allude to such an argument for the first time' in the Outline of Case served just over 2 weeks before the hearing, and 'to do so with such brevity of a single sentence'. This has caused prejudice to HMRC in incurring additional time and costs in preparing this Skeleton Argument and preparing for the hearing generally, and would cause further prejudice as the respondents are unaware of the argument being presented by the appellant or the evidence he is relying on in support.

22. Ms McCreesh replied that the Notice of Appeal was filed on 25 September 2020, at a time when the appellant's representative could not have been aware of the release of the CJEU ruling on 10 June 2021; the appellant's 'position has been changed' by the CJEU ruling; and the appellant is not raising new arguments as suggested by HMRC. Rather, the appellant would be prejudiced if he is to be prevented from advancing his case in accordance with this change of position which is 'beyond his control'. Ms McCreesh's explanation why no formal application had been made for the appellant to amend the ground of appeal is that the appellant is not raising any new arguments in the Outline of Case. Ms McCreesh also took issue with the respondents' skeleton argument wherein is stated that '[t]here is no reference to the Penalty at all' in the Notice of Appeal by highlighting the fact that the sum of penalty being appealed of £9,895 is stated at section 3 of the Notice of Appeal.

23. We read Ms Black's skeleton argument in its context, and where it states '[t]here is no reference to the Penalty at all', we understand the sentence to mean that there is no reference to the Penalty at all *in the ground of appeal* as stated in the Notice of Appeal, and HMRC do not dispute that the appellant has appealed against the Penalty as well as the Assessment.

24. We do not accept Ms McCreesh's submission that the appellant is not introducing new arguments in the Outline of Case, nor do we accept the logic in the submission that there had been a change in the appellant's position due to the *Perfect* ruling. We consider that what has changed is the appellant's ground of appeal, which was formerly staked in the Notice of Appeal on an alleged fact that the appellant was *not* the holder of the goods. After conceding that he was the holder of the goods the Outline of Case, and upon this conceded fact, new grounds of appeal based on this fact have then been introduced in the Outline of Case.

² *Revenue and Customs Comrs v Perfect* [2019] EWCA Civ 465.

25. In fact, the ground of appeal as stated in the Notice of Appeal has materially changed, to the extent that there would be no case for the appellant to advance any more, since the only ground of appeal as stated in the Notice of Appeal pertained to an alleged fact is now conceded.

26. While a legal representative could be expected to keep abreast with the developing law that may be potentially relevant to its clients, we consider that it would be prejudicial to the appellant if he was debarred from having his case argued on the amended grounds, since the appellant could not have been expected to know about the relevance of the *Perfect* case and had to rely on his representative.

27. We had special regard to the timing of the Court of Appeal hearing of the residual matter in the *Perfect* case on 23 February 2022 after the Article 267 reference to CJEU. At the time of the hearing of the present case on 8 March 2022, the decision of the Court of Appeal after hearing the residual matter pertaining to the duty assessment was still pending. The pending decision on the residual matter arguably may be relevant to the appellant's case, and could potentially have given rise to a ground for applying for a stay of the appeal. (The Court of Appeal's decision *Perfect 2022*³ on the residual matter was released on 15 March 2022, a week after the hearing of the present case.)

28. Weighing all factors in the scales, and with the witnesses already in attendance to give evidence for the substantive appeal, we decided that it would be in the interests of fairness and efficient administration of justice to allow the substantive appeal to proceed on the amended grounds and witness evidence to be led, and for the appellant's appeal to be advanced on the grounds as set out in the Outline of Case.

THE FACTS

The Goods and seizure

29. The background facts to this appeal which are not contentious are as follows:

(1) On 5 February 2019, Border Force ('BF') officers intercepted a vehicle pulling trailer K13 at Dover Eastern Docks.

(2) The vehicle was travelling from Calais, and was being driven by the appellant, and was intercepted by the Lane Manager after the appellant attempted to avoid Border Force controls by driving down the Exit Lane.

(3) The HGV vehicle driven by the appellant with a handwritten registration plate 'CN10 [redacted]' and trailer marked 'K13'; the registration number was traced to a vehicle which was owned by R&G Murphy Haulage Ltd ('Murphy Haulage').

(4) The appellant confirmed to BF Officer Judd that he was transporting beer; and that he did not have a 'seal'. There were 27 pallets of mixed beer in the trailer (the 'Goods')

(5) The driver's documents included the CMR with the details of consignor: *Havenweg ... Netherlands*; consignee: *Johnston Logistics UK ...Norfolk*; carrier/transporter: *P O'Shea Transport Services ... Ireland.*

(6) All entries on the CMR were in typeface, except for the registration number of the HGV, which was written by hand.

(7) The CMR required the signature of the 'transporter' in box 18, and shows '*P O'Shea Transport Service*' in typeface, and was signed by the appellant.

(8) The appellant stated in the interview by Officer Judd that (a) he had picked up the trailer in Calais; (b) had opened the back of the trailer to check the load; (c) he was sub-

³ *HMRC v Martyn Glen Perfect* [2022] EWCA Civ 330.

contracted working for an individual named 'John Smith'; (d) he understood what items were prohibited from being imported into the United Kingdom; (e) he declared that he was in possession of a pack of 20 cigarettes.

(9) In relation to the CMR documents, the appellant stated in the interview that: (a) he did not know who completed the CMR documents; (b) he was aware of the legal responsibilities for signing the documents and the penalties involved; (c) he had signed to documents in order to take over the load; and (d) he knew the load contained beer.

(10) Officer Judd referred the obtained information to be checked, and was advised that the Administrative Reference Code ('ARC') of the CMR was invalid.

(11) The Goods were seized, on the basis that an invalid ARC meant that no supporting documentation existed to demonstrate that the beer being transported had paid UK duty. (The HGV with Index 'CN[...]'] and the trailer marked 'K13' were also seized.)

(12) The appellant was issued with forms BOR156 (seizure information notice), BOR162 (warning letter about the seized goods), Notice 1 (what you can and cannot bring into the UK and what you must declare) and Notice 12A (information on what you can do if things are seized), and the appellant signed the relevant forms.

30. Excerpts of BF Officer Judd's notebook on the interview (01:30 hours) are as follows:

(1) The exchanges between Officer Judd ('HJ') and the appellant ('NM') include:

HJ: Is the load beer? NM: Yes.

HJ: Do you have a seal? NM: No.

HJ: *Where was the vehicle loaded?* NM: *I picked up the trailer in Calais.*

HJ: *Where in Calais?* NM: *The Total Garage.* (Italics added)

HJ: Did you enter the trailer? NM: Yes I opened the back doors.

HJ: Where are you delivering to? NM: Norfolk.

HJ: What's the name of the company you work for? NM: I'm sub-contracted.

HJ: To who? NM: I work for John Smith.

HJ: How long have you worked for them? NM: About 1-2 months.

HJ: Have you done this job before? NM: No I'm new at driving lorries.

(2) 02:15 ... Phone call from RFDT [Revenue Fraud Detection Team] stating that the ARC was invalid, and that they wanted the driver to complete the driver questionnaire.

(3) 02:52 [hours] tally conducted of load, matches the CMR.

31. The appellant completed the Foreign Driver Questionnaire as part of the interview by the Border Force, and was signed and dated by the appellant on 5 February 2019 at 02:30 hours. As such the answers given by the appellant to the questions were closest to the time of the seizure event than his oral evidence. Excerpts from the questionnaire are:

(1) Q: Who has hired you for this load? A: John Smith.

(2) 'Don't know' or a '?' is given in the answer box to the questions in relation to address, telephone number (of his hirer), or regarding the owner of the vehicle or trailer.

(3) That he was paid 'weekly' for this job at '£13ph +LAA' [Living Away Allowance].

(4) That he had *not* checked whether the load is expected at its destination.

(5) That he obtained this job '*through friend*'.

(6) That '*John Smith*' made the arrangements for the trip.

(7) That he collected the load at ‘*Calais*’ and to the question ‘What sort of premises [he had collected from]?’ , he answered: ‘*Layby*’.

(8) Q21: ‘Are you aware of what the load contained?’ he replied: ‘*No*’.

(9) Having replied ‘No’ to Q21, the appellant went on to answer Q22, which is a follow up question if Q21 has been answered in the positive.

Q22: If so, how did you know?

A) Looked in the trailer? Ans: Yes

B) Looked at the paperwork? Ans: Yes

C) Were you told by someone? Ans: No

(10) That he was given ‘*CMR Docs*’ as the paperwork, but he did not know who completed the paperwork.

(11) That he had ‘swapped trailers’ when he ‘*dropped empty trailer*’.

(12) That he was due to deliver the load at a ‘*Layby*’ ‘*tomorrow*’ at premises which were a ‘*truck park*’, and as to the paperwork he would ‘*leave with trailer*’.

32. Two further specific questions on the questionnaire are in the following terms:

(1) Q36: ‘Have you signed the CMR to say you are taking control of the load?’ A: *Yes*.

(2) Q37: Are you aware of your legal responsibilities for doing so, and penalties involved? A: *Yes having completed CPCS* [probably Certificate of Professional Competence for driving HGV].

Referral to HMRC

33. There was no timely challenge of the seizure of the Goods, nor were the vehicle and trailer claimed for restoration. In relation to the excise duty not having been paid on the Goods, the referral by Border Force to HMRC was received on 18 March 2019, and was assigned to Officer O’Hern, and led to the following correspondence.

(1) On 5 November 2019, Officer O’Hern wrote to Murphy Haulage requesting any information they had regarding the circumstances around the goods and their seizure.

(2) On 6 November 2019, Officer O’Hern wrote to the appellant, and explained that HMRC were considering assessing the appellant to Excise Duty and a wrongdoing penalty, and requested any relevant information to be provided by 6 December 2019.

(3) On 11 November 2019, Murphy Haulage emailed Officer O’Hern confirming that (a) the vehicle with the said registration number ‘never left Ireland at any stage’ since bought in April 2018, (b) the tracking system ‘trackm8’ Birmingham would provide the requisite information, (c) Niall Murphy had never worked for Murphy Haulage, nor was he known by the company, and (c) trailer K13 did not belong to the company.

(4) On 8 December 2019, the appellant emailed HMRC with his replies regarding the circumstances of being the driver of the vehicle with the Goods.

‘I had just qualified and completed my class 1 HGV license [sic] ... searched online and seen a job advert through Facebook, I obtained a contract from a man called John Smith.’

‘The agreement was to receive a payment every two weeks ... hourly rate ... was £13.00 [with] living away allowance, however I haven’t received payments as to date.’

My period of employment had been 14 days.... I have not been under his employment as of 05/02/2019, I have not been in contact since the night of the seizure as he is not answering my calls or replying to me.'

'I was contacted before this delivery by John Smith, ... I picked the vehicle up on a layby on the A20 (just of [sic] M20), the previous week it had an empty trailer at the time; I picked the alcohol goods up in Calais, it had been dropped load and I received a text message to drop an [sic] empty and take the trailer to the address provided on the CMR.'

'... at the time John Smith had told me [the vehicle] was his, he had informed me his business name was A1 Haulage.'

'Arrangements to transport the goods were made via text message.'

'I contacted him on the night of the seizure explaining what had happened to which he had replied ... 'find my [sic] own transport' and hung up the phone. He has not been in contact with me since and I have been unable to get in contact with him.'

(5) The appellant's replies to some other questions in Officer O'Hern's letter are:

'Qt 14: How, when and from whom did you receive the CMR? A: The CMR was placed in the tool box of the trailer.

Qt 15: What were your instructions and who gave them regarding where you were to deliver to? A: *John Smith via text message.* (Italics added)

Qt 16: Who was the consignee and did you pre-book a time slot with them? If not, why not? A: I am unsure of who the consignee was as I did not organise the transport.

Qt 17: Who are P O'Shea Transport Services, and what (if any) is your relationship to them? A: I am unsure and I have no relationship with them.

Qt 18: Who is the owner of the alcohol goods? A: I am unsure who is the owner of the alcohol goods, I was just employed to drive the HGV.'

(6) On 31 January 2020, Officer O'Hern wrote to the appellant with further requests for information, which fall under the headings of:

(a) **Evidence of Employment** to include (i) a copy of the job advert posted on Facebook; (ii) the contract agreed with John Smith; (iii) the text messages sent to and from John Smith; (iv) evidence of the due diligence checks advised to have been carried out on John Smith; (v) how many jobs being carried out in the 14-day period of employment before the seizure; (vi) to provide contact details of John Smith to confirm that the appellant was working under his instruction.

(b) **Instructions from employer** as advised being given via text message – (i) copies of all of the instructions received in respect of the movement on 05/02/2019 and any other job carried out for John Smith; (ii) whether the trailer was full on the occasion of the pick up of the vehicle from a layby on the A20 (the appellant having advised that it was empty the week previous); (iii) who did the appellant meet when he picked up the vehicle, and if he met no one, where did the appellant get the keys to the vehicle; (iv) the instructions given as regards the pickup point in Calais.

(c) **Vehicle and trailer:** the appellant advised that he carried out 'walk round checks' as required by your CPC – to send a copy of the CPC check list, followed by other questions as follows:

- (i) You stated a plastic seal was on the trailer, did you make a note of the seal number?
- (ii) Was there any money in the vehicle to pay for fuel or the ferry crossing? If not, was the vehicle fuelled up and were tickets provided for the crossing?
- (iii) Were you instructed to change trailers when you arrived at Calais? What checks did you carry out on the trailer that you picked up in Calais? Were you aware that the number had been hand written?
- (iv) Was the second trailer sealed and if so, did you take a note of the seal number – did it match the paperwork?

(d) **CMR and paperwork:** in relation to the appellant's replies, the further questions arose are as follows:

- (i), whether provided with a CMR for both of the movements out of and back into the UK;
- (ii) the appellant said he was unsure of the consignee; this information was shown on the CMR, asked 'where were you instructed to drive the vehicle to after clearing customs?'
- (iii) 'Did you check the CMR? Were you aware that the 3rd copy had a different registration number for the vehicle to the other 2 copies?'
- (iv) Was there any other paperwork in the vehicle – e.g. delivery note, an inventory of all products being carried, was there an operator's licence registered to the vehicle?

(e) **Concerns** under this heading, the concerns of HMRC in relation to the seizure event are set out as follows:

'Border Force Officers stated that you tried to avoid controls and you were intercepted driving down the exit lane – was there a reason for this?'

You state that you were advised to deliver the load in a layby at a truck park in Norfolk and that the paperwork should be left with the trailer. Did you not question this? Why did you think this was the correct procedure?'

You have advised me that you have not received any payment from this employer, what steps have you taken to obtain the monies owed?'

(7) Officer O'Hern's letter of 31 January 2020 stated that HMRC were considering whether the appellant is liable for the excise duty on the seized goods pursuant to reg 13 of the Excise Goods (Holding & Movement Duty Point) Regulations 2010, and Excise Wrongdoing Penalty, and requested a response by 1 March 2020.

(8) The letter of 31 January 2020 was re-issued by email on 2 February 2020. No response was received from the appellant.

Excise Duty and Penalty assessments

34. On 6 March 2020, Officer O'Hern issued the assessment to excise duty in the sum of £23,560 (being £16,142 for beer produced in the UK, and £7,418 for beer produced outside the UK). The assessment was accompanied by the Penalty Explanation letter. The covering letter stated the reasons for the assessment as follows:

- 'The CMR that you handed over to Border Force was later checked and confirmed that it was not a genuine original document.'

- ‘The seized goods did not match what was recorded on the electronic system, meaning that the goods were not covered by the relevant ARC number, and therefore not held in duty suspense. This means that the UK Excise Duty was due at this point and was unpaid.’
- ‘Border Force Officers said that you attempted to avoid controls/ flee controls. Vehicle was intercepted driving down the exit lane.’
- HMRC cannot substantiate the employer that you claim to have worked for as you have not provided any business address.
- Despite my requests, you have not been able to provide me with irrefutable evidence that you were working under instruction of your employer John Smith.
- The haulage company that is named on the CMR P O’Shea Transport Services is believed to be defunct and had your employer/employee relationship with them been as you described, you would have been aware of this. You have had the opportunity since to demonstrate whether this employment was genuine, and you have not.’

35. The Penalty Explanation, while not originally included in the hearing bundle, was provided to the Tribunal during the hearing, and the explanation stated:

(1) The behaviour was ‘deliberate’ for the following reasons:

‘Mr Niall Murphy attempted to enter the UK via Dover Easter Docks on 05/02/2019. The CMR documentation onboard was not a genuine original document, also the seized goods did not travel to the UK with an electronic Administrative Document (eAD) or fall-back accompanying document showing the required valid Administrative Reference code (ARC). Mr Murphy told Border Force Officers that he is a sub-contractor and has been working for John Smith for about 1-2 months. He did not know the address, phone number for John Smith or who the owner of the HGV or trailer. Mr Murphy did not see the trailer loaded, but from the information that he did supply, it appears that he should have known he was involved in illicit activity and taken additional precautions. HMRC considers the duty value due to be an excessive amount to be of a commercial quantity and considers that Mr Murphy was deliberately bringing the non-UK duty paid goods into the UK for a commercial purpose and financial gain.’

(2) The disclosure was ‘prompted’ because Mr Murphy did not tell Border Force/HMRC about the VAT and Excise Wrongdoing before he had reason to believe that HMRC had found out about it, or were about to find out about it.

(3) For reduction, 10% was given for Telling, noting that while the appellant did answer questions from BF Officers on 5 February 2019 during the interview, and the initial letter from Officer O’Hern of 5 November 2019, he did not respond to the further letter of 31 January 2020. Maximum reduction at 40% for Helping, and 30% for Giving access to records was given, making the overall reduction at 80%.

(4) The penalty range of 35% to 70% for deliberate inaccuracy and prompted disclosure, which means the maximum reduction that can be given is 35% (70% minus 35%); reduction at 28% (being 80% of 35% maximum reduction) is applied.

(5) The penalty percentage is set at 42% (being 70% less 28% reduction).

36. Mr Murphy appealed the assessments to HMRC, and a review offer was accepted. Officer Noble as the review officer upheld the assessments to both excise duty and penalty, and his Review Conclusion letter was issued on 8 September 2020.

Officer O’Hern’s evidence

37. Officer O’Hern’s evidence covered the enquiry she carried out into the consignor, at Havenweg 13A in the Netherlands, with a photographic image on Google Maps suggesting that there was a loading bay for lorries. It was noted that the appellant’s position was that he picked up the Goods from a layby. Officer O’Hern confirmed that the registration number on the seized HGV was traced to a lorry owned by R&G Murphy Haulage Ltd in Co. Down in Northern Ireland, whose assurance that the said vehicle never left the UK was accepted ‘at face value’ by Officer O’Hern. She added that Murphy Haulage had told her that they had provided the same information to BF following initial notification of the seizure to them by BF.

38. As to the presence or absence of a seal on the trailer, the appellant stated no seal at the point of seizure, but wrote to Officer O’Hern that there was a plastic seal. Officer O’Hern explained that a seal is required by the EMCS Rules (i.e. Excise Movement Control System) to track a consignment, and that it should remain intact in transit. The customary procedure is for the loader/carrier to complete the CMR, and then put a plastic seal over the load so that the consignee can take delivery with the seal still intact. Each seal has a unique number. Officer O’Hern considered the original answer noted in the BF interview more likely to be correct, and if there had been a seal, it would have been noted by the BF Officer.

39. In relation to other entities in the supply chain, Officer O’Hern stated in her evidence that she was unable to pursue any investigation into (a) John Smith due to a lack of any contact details; (b) P O’Shea Transport Services Ltd, while named as the carrier/ transporter under which the appellant signed the CMR, did not exist as a business; (c) no reply could be obtained from Johnston Logistics as the consignee; (d) no genuine consignor would appear to be present at the address in the Netherlands where the premises were a derelict building; (e) the HGV had a faked number plate. HMRC did not investigate the chassis number of the seized HGV as it was not supplied by BF.

The appellant’s evidence

40. In evidence, the appellant stated that he met with John Smith in London, and got the job through text messages; that he did not know what to do with the questionnaire form asking for John Smith’s contact details, as John Smith had told him not to provide details to BF; that when he was loading in Calais, he had carried out ‘ground checks’ with a walk round to see the load was secured and the contents in the trailer, as well as the CMR and ‘everything seems correct’ and that it was ‘a normal procedure’; that it took him ‘a couple of months’ to take the special driving test to get the certification for driving HGVs.

41. As to driving down the ‘Exit Lane’ at Dover Dock, the appellant said that there are two lanes going out, and that he simply went into the wrong lane because he was inexperienced.

42. The appellant was cross-examined on the inconsistencies in his replies:

(1) In relation to how he got the job to deliver the Goods, he had variously said (a) through a friend, (b) through Facebook, (c) met with John Smith in London, (d) text messages.

(2) He had stated to BF that he had worked for John Smith for about 1-2 months, which would be from around December 2018, but in his email of 8 December 2019 to HMRC, he said that he had been employed for ‘14 days’. He had stated that he was to be paid *weekly* (to BF), and then *every two weeks* (to HMRC), and yet confirmed to HMRC that he had never received any payment from John Smith.

(3) In relation to the pick-up and drop-off arrangements, it was put to the appellant that a reasonable person would be ‘suspicious’ of a destination being a layby for swapping trailers and for picking up and delivering the consignment, as well as the hand-written

registration plate on the trailer. He responded that swapping trailers was common in the haulage industry, and that handwritten trailer plates also do occur.

(4) He had stated in the interview with BF that he was delivering the Goods to 'Norfolk' (where the consignee referred to on the CMR was located), but in the driver questionnaire wrote that he was delivering to 'Layby' in a 'Truck Park'. He responded that at the time he had not been sure: his instructions were to collect from Calais, after that he was not yet told whether to go all the way to the destination, or whether another trailer swap might take place. John Smith had just told him to 'head North to Ashford'.

(5) In his interview with Officer Judd, he stated that he was aware of the contents being beer, and in the questionnaire, he said he was not aware of what the load contained.

(6) In relation to whether there was a seal on the trailer, the appellant stated 'no' at the BF interview, and then 'yes' in correspondence with HMRC. He responded by stating that there was a seal on the internal door, but not the external door which could be opened.

(7) It was put to the appellant that if he had carried out ground checks and the paperwork check, then the consignee (Johnston Logistics in Norfolk), or the owner of the Goods (Havenweg Netherlands); and the carrier/transporter (P O'Shea Transport Services in Ireland) should have been fresh to the appellant and yet none of the details could be provided on the questionnaire.

(8) That John Smith's business was A1 Haulage was not given at the BF interview; and if the appellant had been asked by John Smith not to disclose his contact details, then the appellant had not told Officer O'Hern 'everything [he] knew at the time' as claimed.

43. The Tribunal asked the appellant several questions to clarify the working arrangements with John Smith.

(1) He said he discussed the job to Calais with John Smith by phone whereby all arrangements were 'all done on a phone call'.

(2) Prior to the Calais trip, he said he had worked 'a couple of weeks' for John Smith, which were 'internal work' (i.e. within the UK); such as collecting a load from London to take up to Birmingham; For the first meeting with John Smith, he said that he had flown to Gatwick and then travelled to London. The haulage jobs would usually begin at Brands Hatch.

(3) That he was due to be paid for these two weeks in the region of £1,300 to £1,400 but he did not receive any payment and was asked to do the Calais trip before he would get paid, and he had no choice but to take the Calais job.

(4) That the appellant's father funded him with the trips to London Gatwick (presumably from Belfast), for a 'couple of times; then changed to 3 or 4 times, and settled with 3 times for 6 flights at £60 to £70 each flight.

(5) When asked how he would get from the airport to the layby to pick up his jobs, he said a friend who also worked for John Smith took him there.

44. When asked why he did not respond to the further requests for information by Officer O'Hern's letter of 31 January 2020, the appellant stated that he was working away from the UK, but also said that he did not receive the letter, even though the letter was re-sent by email on 2 February 2020, and was referred to in HMRC's letter of 6 March 2020 (issuing the Assessments), and in the review conclusion letter of 8 September 2020 by Officer Noble.

APPELLANT'S CASE

45. In relation to the strike-out application, it is submitted that the appellant was not the owner of the Goods so he could not have challenged the seizure. Any challenge at a Magistrates' court would be proceedings in rem, and can only deal with the nature of the property and establish that when forfeited, duty had not been paid. The deeming of the goods has no effect on the appellant's appeal against assessment and penalty as the appellant is not claiming that the goods were for personal use.

46. In relation to the Duty Assessment, while the appellant 'accepts that liability arises due to the decision in *Perfect*', it is argued that HMRC did not pursue other entities in the duty chain to establish an earlier duty point. The grounds of challenge are as follows:

(1) The respondents have stated (at para 34 of their skeleton argument) that 'HMRC are under duty to collect the correct amount of tax as required by statute' (appellant's emphasis). It is contended that HMRC are not required to assess by statute and have discretion as suggested by the wording of 'may' under section 12(1)(a) of the Finance Act 1994, which connotes the exercise of a discretion:

'... where it appears to the Commissioners ... that any person is a person from whom any amount has become due in respect of any duty of exercise ... the Commissioners may assess the amount of duty due ...' (appellant's emphasis)

(2) In the circumstances of this case, whilst HMRC may raise an assessment, they should have exercised their discretion not to do so, and Officer Noble has failed to exercise HMRC's discretion not to issue any assessment against the appellant. The circumstances relied upon are:

(a) The appellant whilst holding the goods and liable, was a lorry driver who had just started working about one month prior to the seizure and was inexperienced.

(b) The review officer did not give adequate weight to the appellant's inexperience.

(c) HMRC must often exercise this discretion in situations where the holder of goods is liable to unpaid excise duty but an innocent agent such as post-office worker, or a delivery driver such as Hermes, or DHL.

(3) The respondents are 'seeking to unlawfully restrict the power of the Tribunal' as provided under section 16(5) of FA 1994:

'... 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.'

(4) The power of the tribunal as provided has 'no limit' in respect of the refusal decision to exercise discretion by the reviewing officer in upholding the assessing officer's decision, and the Tribunal has the power to quash this decision or substitute its own decision in this regard.

(5) This is not a public law argument as stated by the respondents and it falls well within the scope of the powers of the Tribunal since s 16(5) FA 1994 gives the Tribunal the same powers as the Commissioners or the reviewing officer.

47. As to the wrongdoing penalty, it is submitted for the appellant that the challenge is on an 'all or nothing' basis, and that the appellant has a reasonable excuse under para 20(1) due to:

(1) At the date of the seizure, the appellant was only 26 in age, and had obtained his Class 1 HGV licence only in December 2018, and had struggled to find employment due

to his lack of experience. The appellant was ‘inexperienced and naïve to the realities of his new employment’, but has now been working as a driver for 3 years and has not encountered any issues with Border Force or HMRC since the seizure event in 2019.

(2) When stopped by Border Force, the appellant confirmed that he was transporting beer and provided full disclosure in his interview with Border Force officer Judd. The appellant was unaware that the goods were liable to unpaid excise duty, and when made aware by Border Force, he was ‘open and honest’ and provided information to the best of his ability and knowledge.

(3) The appellant further assisted HMRC with his 3-page reply to Officer O’Hern, which demonstrated his candour.

(4) The appellant did not have access to EMCS, and had no way to verify whether the ARC stated on the CMR note was valid.

(5) The only information the appellant had was to be found in the documentation he collected when he picked up the goods, and there was nothing in the documents available to him to give rise to any doubts.

(6) Further, the appellant was not the owner of the HGV, and had no right or personal issue in the goods, and his sole aim was to collect and deliver the goods for a fee and in accordance with the instructions received. There is no evidence that he was part of any conspiracy to evade excise duty.

(7) The facts of this seizure are in line with *Perfect* and the Tribunal can and should find that the appellant was an innocent agent lacking in actual or constructive knowledge of the excise status of the goods seized, and as such the appellant therefore had a ‘reasonable excuse’ within the meaning of para 20 of Sch 41 to FA 2008.

48. Ms McCreesh referred to *Carlin v HMRC* [2014] UKFTT 782 (TC) in making her submissions as to what HMRC could have done in not assessing the appellant to excise duty:

‘[30] The Tribunal considers Mr Carlin was not holding the Goods for the purposes of the legislation. ... the Tribunal believes Mr Woods or Woods Transport was the holder of the goods and Mr Carlin was merely the courier. ... HMRC failed to carry out the most basic checks. They were supplied by Mr Carlin with a mobile telephone number for Mr Woods which they did not ring. They could easily have checked the Lorry’s registration number to ascertain the name and address of the registered owner. ...’

HMRC’S CASE

49. In relation to the appellant’s evidence, Ms Black submits that the appellant (a) was unable to provide consistent answers to simple questions; (b) failed to carry out due diligence on the consignment, which was particularly relevant given that it was his case that he was very new to driving HGV and had recently completed his training; (c) failed to register the numerous factors that should put someone on enquiry of the status of the consignment; (d) avoided customs control at Dover Dock; (e) contradicted his own answers at BF interview in his written response to HMRC’s questions; (f) was inconsistent as to whether he received or not receive HMRC’s letter of 31 January 2020.

50. In relation to the Duty Assessment, Ms Black submits that:

(1) The Tribunal lacks jurisdiction to consider whether HMRC should have exercised a discretion in an appeal against an assessment. Section 16(5) FA 1994 relied upon by the appellant does not change this because the Tribunal does not have general supervisory jurisdiction, as reiterated in *KSM Henryk Zeman v HMRC* [2021] UKUT 182 (TCC).

(2) The appellant has accepted that he is liable to the excise duty and is arguing that HMRC should not have issued an assessment for some unidentified reason, which is not arguable for the same reason as what Nicholls LJ stated in *Aspin v Estil* [1987] STC 723.

(3) The argument raised for the first time in the appellant's oral submissions that essentially due to the CEMA provisions there would be a cohort of people who were unable to challenge a seizure (for being not the owners of the goods) and that effectively, the only safeguard against assessment would be the exercise of HMRC's discretion *not* to assess, is flawed for the following reasons:

(a) This is ultimately an argument of abuse of power and properly a public law argument only suitable for judicial review.

(b) The appellant failed to identify any basis or reasoning for HMRC to exercise a discretion not to assess in this case, or for the Tribunal to interfere with this.

(c) The argument confuses the different processes of (i) seizure and forfeiture, and (ii) assessment. Any decision in relation to seizure is separate and distinct to the decision to issue an assessment. Even if the appellant could not have successfully challenged the seizure, that is not determinative as to whom HMRC can assess for excise duty and penalties.

(d) This is consistent with *HMRC v B&M Retail* [2016] UKUT 0429 (TCC) (*B&M Retail*), which emphasised the importance of Member States assessing and ensuring that duty is paid.

(e) The appellant is in this position as a result of his own actions and decisions. Whilst the appellant had ample opportunity to provide contact details for John Smith, the appellant stated in his oral evidence that he chose to withhold those details on instruction from John Smith.

51. In relation to the Penalty, Ms Black addresses the point which arose during the hearing as regards the interaction between para 17(1) and para 20(1) of Sch 41 FA 2008. Since the reasonable excuse defence is available only if the act or failure is not deliberate, the question arises as to whether it is possible to raise a reasonable excuse argument in the context of a para 17(1) appeal where the appellant has not challenged the deliberate basis of the Penalty. No case law seems to have addressed this point expressly; HMRC maintain that the appellant's actions were deliberate for the reasons given in the penalty explanation letter, the skeleton argument and the submissions made, and invite the Tribunal to make a finding of fact in this respect.

DISCUSSION

The Excise Duty Assessment

Legal basis for the assessment

52. The issue to determine this part of the appeal concerns the legal basis for assessing the appellant to the excise duty unpaid on the seized goods as provided under s 12 FA 1994. In this respect, we have regard to what the Upper Tribunal stated in *B&M Retail*:

'[150]. ... 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. ... HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before

them to assess any other person who is liable for the excise duty by virtue of any earlier excise duty point that may have occurred.’

53. The decision of *B&M Retail* held that the HMDP Regulations are intended to impose liability for excise duty at the earliest duty point that can be established on the facts, which is confirmed in *Davison & Robinson v HMRC* [2018] UKUT 0437. As to whether HMRC could have pursued an earlier duty point in the supply chain, the Tribunal should be slow in finding that Officer O’Hern’s check was in any way insufficient, based on the checks which she had carried out on P O’Shea Transport as the transporter, Havenweg as the consignor, and Johnston Logistics as the consignee. The appellant admitted to having the contact details of John Smith at the time of seizure, but for whatever reasons, had withheld the details, despite being given repeated opportunities: at the BF interview, by Officer O’Hern’s requests for the information. In *Carlin* the FTT found that Woods Transport was the ‘holder’ of the goods for the purposes of the HMDP Regulations. Each case has its own factual matrix to be considered in its own terms; the conclusion reached by the FTT in *Carlin* upon the fact that an entity at an earlier duty point was the holder of the goods is not a conclusion which this Tribunal can reach.

54. In any event, and given the foregoing, if the appellant still considers that HMRC could have pursued another entity in the present case (other than the driver as the holder of the goods) to assess for the unpaid duty, then that would be a matter for judicial review. This point is made clear by the Upper Tribunal in *B&M Retail*:

‘[153]. ... B&M wish to be satisfied that there are not in fact earlier points in the supply chain where an excise duty point could clearly be established on the evidence or might be if such an investigation were in their view more vigorously pursued. We would be inclined to agree that it would not be in the interests of justice that HMRC should simply be able to sit back and say that the burden is on the taxpayer to provide the evidence to displace its liability, when the evidence that HMRC do actually have is in fact sufficient to demonstrate, objectively, that an earlier excise duty point could be established. We are in no position, however, to say whether that is the position in the present case, and any concerns of that nature would anyway have to be pursued through the medium of judicial review.’

55. The appellant has referred to the CJEU’s ruling in *HMRC v WR* as relevant to his appeal, wherein the CJEU considered the questions being referred are set out in the following terms:

‘1. Is a person ... who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive [2008/118] in circumstances where that person:

- (a) had no legal or beneficial interest in the excise goods;
- (b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and
- (c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty in Member State B at or prior to the time that they became so chargeable?

2. Is the answer to Question 1 different if [the person in question] ... did not know that the goods he was in possession of were excise goods?’

56. The CJEU’s interpretation of the purpose of Article 33(3) of the 2008 Directive in relation to the referred questions is as follows:

[33] ...the Advocate General observed [that] ..., the intention of the EU legislature was to lay down a broad definition, in Article 33(3) of Directive 2008/118, of the category of persons liable to pay excise duty in the event of a movement of excise goods already ‘released for consumption’ in one Member State and held, for commercial purposes, in another Member State in order to be delivered or used there, so as to ensure, so far as possible, that such duty is collected.

[34] However, to impose an additional condition requiring that the ‘person ... holding the goods intended for delivery’, within the meaning of Article 33(3) of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty.’

57. In gist, the CJEU concluded that the terms of the Article 33(3) do not require additional conditions to be satisfied other than ‘being in physical possession’ of the goods at the relevant time for a liability to arise:

[36] In the light of the foregoing, the answer to the questions referred is that Article 33(3) of Directive 2008/118 must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.’

58. The Court of Appeal in *Perfect 2022* summarised the effect of the CJEU ruling in *HMRC v WR*, taking into account the context of the European Union (Withdrawal) Act 2018, and it reiterated the conclusion made by the Court in *Perfect 2019*:

[66] ... in the absence of any relevant information relating to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, if that is the only excise duty point which can be established. ... where, as here, a driver is unable to identify the consignor, or the importer, or his employer, the only person who can be assessed for the duty is the driver himself. If he cannot be assessed in circumstances where HMRC or a Tribunal concludes that he was unaware that the goods were liable to duty, the opportunities for smuggling and fraud are manifestly greater. Accordingly, strict liability appears to have been an accepted feature of the regime under successive Directives as explained by Lord Hoffmann in [*Greenalls Management Ltd v Custos and Excise Commissioners* [2005] UKHL 34, [2005] 1 WLR 1754].’

59. Contrary to the original ground of appeal, the appellant no longer contends that he was not the holder of the Goods. By conceding that he was the holder of the Goods at the relevant time, the application of the *Perfect* line of authority is that strict liability is the feature of the regime, and as the holder of the Goods, the appellant is therefore liable to the unpaid excise duty, and it is unnecessary for HMRC to establish whether he had actual or constructive knowledge of the goods being excise goods with unpaid duty. We conclude therefore that the very fact that the appellant was the holder of the Goods is the sufficient factual basis on which the legality of the excise duty assessment on him can be founded.

Tribunal's jurisdiction under section 16(5) FA 1994

60. We turn next to consider the appellant's main ground of appeal, which is to say that HMRC have failed to exercise their discretion *not* to assess the appellant. We first consider this submission on the factual basis. We have regard to the strict liability criterion in assessing the holder of the goods in these circumstances, and the appellant has not advanced any factual contentions why HMRC's decision to assess the appellant in this instant case was unreasonable in the Wednesbury sense: in that HMRC have taken into account irrelevant considerations or failing to take account of relevant considerations.

61. As to the jurisdictional aspect underpinning this ground of appeal, the Tribunal is entirely a creature of statute with no inherent jurisdiction. For this reason, the Tribunal has no general supervisory power over HMRC's exercise of discretion, and to whatever extent the Tribunal has a supervisory jurisdiction, that is strictly limited to the terms of a specific statutory provision. In this respect, s 16(4) FA 1994 is a good example of the limited supervisory jurisdiction conferred by the statute on the Tribunal over the Commissioners or decision-makers in relation to 'an ancillary matter', and that 'the powers of an appeal tribunal on an appeal under this section shall be *confined* to a power' as set out under s 16(4)(a) to (c) (italics added). The statutory wording 'confined' is indicative of the limited scope of any such supervisory jurisdiction, and how these limited supervisory powers are to be exercised are provided in the highly prescriptive terms as set out in the subsections 16(4)(a) to (c).

62. Section 16(5) FA 1994 is heavily relied upon by the appellant, and Ms McCreesh invited the Tribunal to read the provision as conferring us with the power to re-make Officer Noble's decision. We disagree with Ms McCreesh's submission, and are firmly of the view that s 16(5) is to be interpreted in its context, and against the prescriptive scope of Tribunal's supervisory jurisdiction as set out under s 16(4). It is not permissible to interpret s 16(5) as conferring the Tribunal with a general supervisory power of the kind for evaluating the basis and reasonableness of a decision by the Commissioners which does not fall within the ambit of 'an ancillary matter'. Whether to assess the appellant to the unpaid excise duty is not 'an ancillary matter', and the statutory wording of s 16(5) has not expressly provided for any supervisory jurisdiction to the appeal tribunal.

63. Insofar as s 16(5) confers the Tribunal with jurisdiction to quash or vary any decision made by the Commissioners, and to substitute our own decision, that will pertain to substantive matters over which the Tribunal has appellate jurisdiction. For example, if the evidence points to a different entity (other than the appellant as the driver) being liable to the unpaid duty at an earlier duty point in the chain, then it would be open to the Tribunal to quash HMRC's decision to assess the appellant. As we have set out in our discussion on *Carlin*, in the present case, HMRC could not have established another entity from the information made available to them by the appellant.

64. Another example of substantive matter over which this Tribunal would have appellate jurisdiction would be the quantum of the assessment. The issue of quantum, as respects whether the excise duty has been correctly calculated in relation to the seized goods, has never been a matter of dispute. The appellant's main ground of appeal therefore cannot be entertained by this Tribunal, given its fundamental flaw in confusing the nature of the Tribunal's jurisdiction under s 16(5), which is quintessentially appellate in nature, and cannot be commuted into a general supervisory jurisdiction as sought by the appellant.

65. As to the supplemental ground of appeal that the appellant could not have been able to bring proceedings at the Magistrates' Court to challenge the seizure, we are in full agreement with Ms Black's analysis that this contention is flawed by conflating the seizure and forfeiture procedure with the process that allows HMRC to assess the unpaid duty on the seized Goods.

66. The remedy sought in an action to challenge a seizure is restoration of the seized items. It is accepted that the appellant did not have the locus standi to challenge the seizure of the Goods or the vehicle and trailer at the Magistrates' Court for the reason that he was not the owner of either goods or vehicles. Whether the appellant had the standing to bring an action in the condemnation proceedings has no bearing whatsoever on whether HMRC are entitled to assess him to the unpaid duty: the duty *assessment* is premised on the appellant being the 'holder' of the Goods for the purposes of the HMDP Regulations, and *not* premised on the appellant being the 'owner' of the Goods.

67. In our view, it is simply not arguable that HMRC's entitlement to assess the appellant as the 'holder' of the Goods is in any way impeded by the relevant legislation just because the appellant could not have challenged the seizure. We agree with Ms Black that the wording of the relevant legislation points to the fact that the persons liable to an excise duty assessment are necessarily wider than those who can successfully challenge seizure.

The Penalty Assessment

Whether the appellant an innocent agent

68. The appellant's appeal against the Penalty is staked on the Tribunal being able to make a finding of fact that he was an innocent agent in like manner as the taxpayer in *Perfect*. We are unable to make such a finding of fact that the appellant was an innocent agent for his appeal against the Penalty to succeed for the following reasons.

(1) As a witness of fact, we find the appellant to be wholly unreliable, given the many inconsistencies in his factual answers to straight-forward factual questions, as highlighted in the cross-examination, see §42.

(2) The appellant admitted to having contacted John Smith via text message (§33(5) Qt 15), but the contact details of Smith were withheld by the appellant.

(3) The items of information requested as detailed by Officer O'Hern in the letter of 31 January 2020 (§33(6)) as regards (i) evidence of employment, (ii) instructions from employer, (iii) vehicle and trailer, (iv) CMR and paperwork, have not been fully addressed, and remain as lacunae in the appellant's overall evidence.

(4) The inconsistencies and lacunae in the appellant's overall evidence severely undermine his credibility as a witness, to the extent that we are unable to accord his evidence with much credence.

(5) At the time of the seizure event, the appellant had recently completed the training to be certified to drive HGVs, and yet he did not appear to have taken due care in carrying out the due diligence required of the paperwork, or of the surrounding circumstances relating to the upload and delivery of the consignment.

69. We have considered, and concluded, that the inconsistencies in the appellant's evidence are not of a nature that can be attributed to a lapse of recall. The inconsistencies are of the nature of material differences in factual details which suggest that probably neither (or either) of the answers were the true answers. An example of such a glaring inconsistency that could not be the result of a lapse of recall is that the appellant stated to the BF officer that he collected the load when he picked up the trailer from 'The Total Garage' in Calais, (§03(1)), but in the Driver Questionnaire he wrote 'Layby' (§31(7)) as the answer to the question of 'What sort of premises' from which he had collected the load. The two answers were materially different in their factual details, and were given within the duration of the BF interview which lasted for an hour: the interview started at 01:30 hours and the Questionnaire was signed at 02:30 hours.

70. Given our findings in relation to the appellant's credibility, we do not accept the explanation he gave as to why he took the Exit Lane at Dover Dock to avoid customs control. It is highly significant to our overall assessment whether the appellant was an innocent agent that he had (for whatever reason) withheld the contact details of John Smith. On the balance of probabilities, the appellant was not an innocent agent for the purposes of the Penalty appeal.

Reasonable excuse and quantum

71. Following *Perfect*, if the Tribunal had been able to make a finding of fact that the appellant was an innocent agent as concerns the seizure event, then the appellant could have availed himself of the defence of reasonable excuse, and for the Penalty to be discharged. Since we are unable to make a finding of fact to that effect, the foregoing means that the defence of reasonable excuse is irrelevant.

72. In any event, as Ms Black points out in her written submissions, the defence of reasonable excuse is only available where the Penalty has been assessed to be 'careless'. In the present case, the Penalty has been assessed as 'deliberate', and there is no evidence or submission on behalf of the appellant to re-categorise the Penalty as 'careless'. For the avoidance of doubt, even if we had heard such submission from Ms McCreesh, based on the evidence as detailed in this decision, there is no scope for re-categorising the Penalty to 'careless'.

73. On the issue of quantum, the Penalty appeal is staked on an 'all or nothing' basis. In other words, the Penalty appeal is brought under para 17(1) as respects whether a penalty is payable, and not under para 17(2) as against the amount of a penalty payable. HMRC have given the appropriate percentage of overall reduction for Helping, Telling and Giving. Accordingly, the quantum of the Penalty is upheld in full.

DISPOSITION

74. The appeal is dismissed. The excise duty assessment in the sum of £23,560, and of wrongdoing penalty assessment in the sum of £9,895 are confirmed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**DR HEIDI POON
TRIBUNAL JUDGE**

Release date: 1 December 2022