



[2021] UKFTT 0195 (TC)

**TC08145**

*Export of vodka under suspension – consignment never arrived at destination - application of Article 10 Council Directive 2008/118/EC and Regulations 80 and 81 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 – whether guarantor liable for movement irregularity - yes*

**Appeal  
number:  
TC/2017/04413**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BETWEEN**

**HAYMAN GROUP LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE IAN HYDE**

**The hearing took place on 10 and 11 May 2021. With the consent of the parties, the form of the hearing was a video hearing, with all parties attending remotely, using the Tribunal video platform. A face to face hearing was not held because this was not considered appropriate during the coronavirus pandemic.**

**I was referred to electronic hearing bundles and skeleton arguments from both parties.**

**Hammad Baig, counsel for the Appellant**

**Joshua Carey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. This appeal concerns whether the appellant as an exporter of alcoholic beverages is liable to pay excise duty where the goods being moved in suspense from the UK to an authorised warehouse in Italy never arrived. Specifically, the issue is whether the duty point arises or is deemed to arise in the UK and so is a matter for HMRC to assess or it arises in Italy and so is a matter for the Italian tax authorities.
2. All references in this decision to Articles are to Council Directive 2008/118 (“the Directive”) and references to Regulations are to the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the “2010 Regulations”).

### THE EXCISE EXPORT REGIME

3. The suspense regime allows goods otherwise subject to excise duty to move within the European Union without payment of duty.
4. The recording and validating movements of goods within this regime is managed through the Excise Movement and Control System (the “EMCS”). Anyone moving such goods, such as authorised warehousekeepers, registered consignors, registered consignees and temporary registered consignees must register to use the EMCS.
5. Before a movement of duty-suspended excise goods can take place the consignor must complete and submit on EMCS an electronic Administrative Document (“eAD”) including details of the consignor and consignee, the goods, the transporter, the vehicle registration, details about the expected journey time and the identity of the guarantor. Once the eAD has been validated, the EMCS will generate an Administrative Reference Code (“ARC”), a number which is unique to that movement. The ARC must be made available to be inspected by the relevant authorities during the course of the movement.
6. Once the consignee has received the goods, the consignee must check the consignment against the eAD. The consignee must complete the report of receipt and submit the message through EMCS to the member state of destination. This receipt is then passed to the consignor, consignee and country of origin.
7. It is an integral part of the suspension regime that one party must provide a guarantee for the suspended duty during its movement.

### THE FACTS

8. Witness evidence was given by Mr Christopher Lipscomb and Mr James MacDonald on behalf of the appellants and Mrs Claire Crawford for HMRC. Mr Lipscomb and Mr MacDonald are both business managers employed by the appellants and Mrs Crawford is the HMRC officer in the Excise team involved in running the investigation which led to this appeal. I found all three witnesses to be honest and truthful.
9. I find the facts in this appeal as set out below.

### **The appellant and the excise guarantee**

10. The appellant is a private limited company involved in the production of alcohol and alcoholic beverages which are sold in the UK and internationally. One of the brands manufactured by the appellant is Kalinska vodka.
11. The appellant contracts with hauliers to deliver goods to purchasers, normally being hauliers with which it is familiar.

12. As part of its trading arrangements the appellant has in place with HMRC and Barclays Bank a guarantee under which, if the appellant agrees it applies to a shipment of goods in suspension, the appellant guarantees to pay any excise duty payable as a result of any irregularities. The terms of the guarantee are as follows:

“UNDER THIS GUARANTEE

Barclays Bank PLC (‘the Guarantor’) undertakes to pay, to the Commissioners of H.M. Revenue & Customs (the ‘Commissioners’) for themselves and/or on behalf of the Fiscal authorities of Member States and the Fiscal authorities of any country which accedes, to the European Union during the continuance of this Guarantee and immediately on first written demand, the sum or sums stated by the Commissioners in such demand as being the amount or amounts; or balance, for which the Principal HAYMAN GROUP LTD ...is or may become liable to any Member State for any alleged irregularity resulting in the loss of Duty (excepting losses attributable to natural waste or other legitimate cause) in relation to

(i) movements of duty suspended excise goods (except where the goods are being moved under the Community Transit arrangements covered by a CT Guarantee); and

(ii) movements of goods under Regulation 16(5) of the Excise Warehousing (Etc) Regulations 1988”

13. It is agreed that if excise duty is payable in respect of the matters covered by this appeal then the guarantee applies and the appellant is liable for the duty.

**The sale to Meridian**

14. In September 2015 the appellant was contacted by a Hugh Hutton representing Meridian Detroit (“Meridian”), a new customer. Meridian wanted to buy a consignment of vodka. Following samples bottles being collected for approval, Mr Hutton agreed by e mail on 7 October 2015 to confirm the order, being for 23,000 bottles of Kalinska vodka. It was agreed that the order would be shipped to La Cave, a bonded warehouse in Italy, where Meridian would consolidate it before shipping to Meridian’s customer in Africa.

15. Mr Hutton suggested the appellant use Hazelhaul Limited (“Hazelhaul”) as haulier, a company the appellant had never dealt with before. The consignment was, by agreement, shipped under the appellant’s guarantee.

16. Concerns were raised within the appellant with the due diligence documents provided by Meridian and additional checks were carried out on Meridian, Hazelhaul and La Cave. This included the appellant contacting the appellant’s designated HMRC excise officer, Ms Fiona East, to ask if there was any reason not to complete the order. HMRC advised it was a commercial decision for the appellant as to whether to proceed.

17. The appellant only produced Kalinska vodka on 2 or 3 days a month and the appellant produced the vodka specifically for the sale to Meridian. As the product was intended for export, the labels for the bottles did not include an excise stamp. A lot code was printed on each bottle identifying the production run. The lot code followed the industry standard of convention of being based on the day of manufacture.

18. On 5 November 2015 the appellant dispatched the consignment to La Cave by being loaded onto a single Hazelhaul truck at the appellant’s premises. The consignment was entered into EMCS and processed under ARC15GB0000000027027774 (“the Meridian Vodka”).

19. On 7 November 2015 the movement was declared as received on EMCS by La Cave but it never arrived.

## **The Sheffield seizure**

20. On 2 March 2016 Sheffield police contacted the appellant to inform them that bottles, apparently of Kalinska vodka, had been seized at a self-storage unit in the UK (“the Seized Vodka”). The appellants notified HMRC of the seizure on the same day.

21. The seizure consisted of 64 bottles with labels, identifying the contents as Kalinska vodka. The back label on each bottle included what purported to be an excise duty stamp denoting that the duty had been paid and quoting the appellant’s stamp registration number.

22. The appellants, having prior experience of counterfeiting, asked the police if they could have a bottle to carry out chemical testing of the contents as this would conclusively identify whether it was their product. The appellants never received a bottle and so chemical testing was never carried out.

23. Mr Baig for the appellants argued that the Seized Vodka was counterfeit. Mr Lipscomb produced to the hearing photographs of a Seized Vodka bottle, a retained Meridian Vodka bottle and drawings for the label design. He also provided oral evidence as to the differences between the bottles sold to Meridian and the Seized Vodka, being in summary:

(1) The labels, whilst similar were different, specifically the printed design at the edge of the labels had fewer lines.

(2) The back label of the Seized Vodka bottles included a vodka duty stamp. This stamp would have been required to demonstrate to purchasers in the UK market that excise duty had been paid. The Meridian Vodka, as it was intended for export, did not include such a stamp.

(3) If the bottles were the Meridian Vodka then because of the label differences, the front and back labels must have been changed. This would have required an enormous effort. Due to the bottles being warm and the factory cold when the labels were attached there was significant risk of condensation. Accordingly, a very strong “high tack” glue was used by the appellant to affix them. Any attempt to remove the labels would have resulted in residue which would have shown up on the Seized Vodka bottles.

(4) The lot codes were not significant as the convention for the numbering was commonly used on the industry and, in any event, could have been copied from one of the Meridian Vodka bottles.

(5) The Seized Vodka was packed in 10 bottle white cardboard boxes. The Meridian Vodka was packed in 12 bottle brown cardboard boxes with identifying labels on the exterior with the lot code, product information and bar code.

24. Mr Carey for HMRC took the view the bottles were not counterfeit for the following reasons;

(1) The lot codes printed on the bottles matched those used on the Meridian Vodka and it was extremely unlikely anyone could have guessed the dates on which the vodka was produced. Further, the number of individuals who could have had access to the Meridian Vodka bottles to note the lot code was very limited, it being loaded directly from the appellant’s premises onto the Hazelhaul truck.

(2) The labels could have been substituted, indeed there was some evidence that the edge of the labels had not been affixed properly.

(3) The police evidence was that the Seized Vodka was packed in boxes of 12 bottles.

- (4) It is a remarkable coincidence that counterfeit vodka was discovered just four months after a consignment of vodka bearing the same lot code was diverted to an unknown destination.
25. There are two potential explanations as to the nature of the Seized Vodka, either:
- (1) It is the Meridian Vodka but the labels of 23,000 bottles have been substituted; or
  - (2) It is counterfeit vodka that either by accident or through information obtained by counterfeiters happens to bear the same lot code as the Meridian Vodka
26. Both explanations appear unlikely and it is unsatisfactory that chemical analysis was not carried out. However, on the balance of probabilities I accept the appellant's evidence and find that the Seized Vodka is counterfeit.

### **The Italian Investigation**

27. Individuals connected with La Cave were under separate investigation for fraud by the Italian authorities and La Cave was under surveillance from June to December 2015, which ultimately led to the prosecution of a number of individuals in Italy.
28. The Italian authorities identified some 2,083 shipments with eADs which never arrived at La Cave, notwithstanding that receipt had been acknowledged on EMCS.
29. Following the surveillance operation a 450 page transcript of a detention order issued by the Italian Director of Public Prosecutions translated into English and summarising what the Italian authorities knew was circulated to relevant European authorities giving details of the frauds uncovered ("the Detention Order"). In the UK the order was sent to HMRC where it was cascaded down to investigating officers, including Mrs Crawford who was tasked with investigating a number of named UK exporters, including the appellant.
30. The Detention Order included the following:

"Here too, as in the case of the tax warehouse of De Meersman in Favara (Province of Agrigento), these are certainly fictitious since the warehouse in question, following an initial period of surveillance carried out by the Observation, Surveillance and Tracking Services at the time of the first acceptances and completions of e-ADs destined for La Cave, as per the service reports prepared and referred to in the Attachment to the Notification of Criminal Offence, was continually under video surveillance.

As a result of the continual video surveillance of the tax warehouse, started on 18.06.2015 and terminated on 15.12.2015 as per Attachment B "VIDEO RECORDINGS" referred to in the Notification of Criminal Offence, it is possible to assert with absolute certainty that no shipment of goods ever arrived at the destination and that consequently no shipment cargo of the same ever left there for export.

The activities of the "LA CAVE SRL" tax warehouse came to a natural end upon the surrender by the legal representative, Cassulo, Claudio, of the excise duty code on 30.11.2015.

The reason behind the criminal organisation surrendering the licence for the tax warehouse lies in essence in the awareness of some of its members of investigations and monitoring at an international level of tax warehouses which had fictitiously dispatched alcohol products to the Italian warehouses under consideration. This situation created a fear within the criminal organisation under investigation of being connected with the wrongdoings committed by those consignor tax warehouses which were the subject of the international monitoring.

Following the submission of the excise duty code, the Customs Authorities of Alessandria, duly authorised by this Office of the Public Prosecutor, proceeded to carry out an administrative check of the guarantee<sup>37</sup> which, on completion of the same, resulting in tax findings of approximately €64 million, as set out in Attachment B “Tax Checks” referred to in the Notification of Criminal Offence.

The consignor tax warehouses which had fictitiously shipped alcohol to the La Cave tax warehouse in Tortona are the following:

....

- HAYMAN LIMITED

...”

31. Further, the ARC number used for the movement of the Meridian Vodka was in the 2,083 movements listed in the Detention Order.

32. The Detention Order also provided summaries and transcripts of recorded conversations between individuals alleged to be part of the fraud:

“Still on 06.11.2015, in a conversation in English between Cimieri and “Piccolo” (numbered 96 of 06.11.2015 - subject Frank int.2, Decree 165/2015), the latter says a number, “98600”, which probably represents the total amount of fees paid for the completions of the spirits effected during the week:...

U: The Little Man F: Cimieri

F: Hello

U:...(poor sound, unintelligible)

F: Talk louder.

U: 98600 nine eight six zero zero

F: OK.

U: Up to today and it includes the bottles for tomorrow.

F: Fine.

U: Listen, the lorry, which they did yesterday from the UK, the lorry is coming from Alex (Alessandria). You know what we did yesterday from the UK

F: Yes, yes.

U: From the UK. The lorry will arrive there tomorrow at 10 and they're asking if you can stamp the documents for them...for when they come back?

...

Subsequently, (numbered 100 of 06.11.2015 - subject Frank int.2, Decree 165/2015) Cimieri and Piccolo are updating one another about the stocks in the e-AD system issued by the various overseas tax warehouses and about the possibility of carrying out the completions over multiple dates

U: Little Man CIMIERI: Cimieri

..redacted..

CIMIERI: How many are there in the system?

U: 3, 3

CIMIEMI: There are 2 in the system.

U: No, 1 Germany one 2 GB ones

CIMIEMI: No, 1 GB one

U: No, remember. 1 GB one today, Pluto today at 16.30 and then 1 Hayman one at 11.00

CIMIEMI: That's yesterday or are you talking about today?

U: Today there are 2, in total 3, there's one more Pluto from DHL

CIMIEMI: 1 Germany one and 1 Pluto one

...redacted...

CIMIEMI: But tomorrow we're closing...(unintelligible)

U: No, you have to close just 1 bottle, the one from yesterday. The others be will closed on Monday"

33. The appellant argued that these conversations perhaps showed that the Italian authorities knew that the appellant's consignment was destined for Allessandria (Alexandria).

34. I find that the Meridian Vodka never arrived at La Cave as a result of fraudulent activity. However, there is no evidence as to how or when the Meridian Vodka was diverted, which country the diversion took place in or the consignment's ultimate destination. The only known facts are that, having been entered into the EMCS system, it was loaded onto a Hazelhaul truck at the appellant's premises on 5 November 2015 and receipted as having been received on EMCS on 7 November 2015. I do not accept the appellant's submissions that the conversations repeated in the Detention Order show any more information on the irregularity beyond the fact that the appellant's consignment was one of the deliveries subject to the fraud.

### **HMRC's investigation**

35. On 27 November 2015 HMRC e-mailed the appellant seeking information on the Meridian consignment, based on the Detention Order provided by the Italian authorities with additional enquiries on 7, 8 and 21 December 2015. On 23 December Officer HMRC e-mailed the appellant explaining that the enquiry had ceased.

36. On 2 March 2016 the appellant notified Ms East of the seizure by Sheffield Police.

37. On 3 March 2016 Ms East notified the Appellant that HMRC would liaise with the Police in the matter. Ms East advised the Appellant not to try to obtain information on the parties involved on behalf of HMRC unless it was information they would normally require for their business.

38. In July 2016 HMRC received information from the Italian authorities confirming that the Meridian Vodka did not arrive at La Cave and that the consignment had been fraudulently receipted on EMCS by individuals in Italy.

39. On 6 February 2017 Mrs Crawford sent a pre-assessment letter to the appellant which requested information in relation to a different unrelated consignment but also advised the appellant that the Meridian Vodka consignment had not arrived at La Cave and that the Appellant were therefore liable to pay the duty.

40. On 10 February 2017 the appellant advised Mrs Crawford they had no evidence that the Meridian Vodka had not arrived at the designated warehouse and that EMCS recorded that the goods had arrived at the registered warehouse in Italy.

41. On 23 February 2017 Mrs Crawford issued to the appellant an excise duty assessment in the sum of £167,287.00, as follows:

“Goods dispatched from Hayman Group Limited to La Cave tax warehouse in Italy under ARC number 15GB0000000027027774 failed to arrive.

I must therefore advise you that:-

1. The goods that were collected from Hayman Group Limited failed to arrive and are missing, which has caused an irregularity under Regulation 81 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, creating a duty point under Regulation 6(1)(a). The duty point is taken as the date of dispatch from Hayman Group Limited, advised as 5 November 2015.

2. Hayman Group Limited are the person or persons responsible for paying the duty by virtue of Regulation 9(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

...

My reason to issue this assessment for duty are as follows:-

1. Information provided to us by the Italian Authorities confirmed that the load was not received at the La Cave tax warehouse.

2. The Report (sic) of Receipt (sic) on the ECMS system had been falsely submitted by the tax warehouse”

42. The letter also contained information about how the duty had been calculated, about which there is no dispute in this appeal.

43. On 22 March 2017 the appellant requested a statutory review.

44. On 28 April 2017 HMRC issued their review conclusion letter upholding the assessment on the basis that, as it had duty guarantee in place, the appellant accepted the liability to pay the duty should an irregularity occur during the duty suspended movement and therefore found the decision to assess the appellant had been reasonably made. HMRC acknowledged that the assessment should have been issued pursuant to s12(1A) Finance Act 1994 and not s.12(1)(a).

45. The appellant appealed to this Tribunal.

#### **THE DIRECTIVE**

46. The Directive and the 2010 Regulations govern the movement of goods in suspension and the imposition of excise duties in the event of an irregularity.

47. Preamble (8) to the Directive highlights the need for clarity as to the responsibility for payment of the suspended duty where there have been irregularities in the movement of the goods:

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

48. Preamble (11) sets out general principles applicable to determining in which Member State the duty is due on the occurrence of an irregularity:

“(11) In the event of an irregularity, excise duty should be due in the Member State on whose territory the irregularity has been committed which has led to the release for consumption or, if it not possible to establish where the irregularity has been committed, it should be due in the Member State where



it has been detected. Where excise goods do not arrive at their destination and no irregularity has been detected, the irregularity shall be deemed to have occurred in the Member State of dispatch."

49. Preamble (17) envisages the movement of goods within a duty suspension arrangement:

"(17) It should be possible for excise goods, prior to their release for consumption, to move within the Community under suspension of excise duty. Such movement should be allowed from a tax warehouse to various destinations, in particular another tax warehouse but also to places equivalent for the purposes of this Directive.

50. Article 4 defines a duty suspension arrangement:

**"Article 4**

For the purpose of this Directive as well as its implementing provisions, the following definitions shall apply:

...

7. 'duty suspension arrangement' means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;

51. Article 17 permits movement of goods within a duty suspension arrangement:

**"Article 17**

1. Excise goods may be moved under a duty suspension arrangement within the territory of the Community, including where the goods are moved via a third country or a third territory:

(a) from a tax warehouse to:

(i) another tax warehouse;

(ii) a registered consignee..."

52. Article 18 provides that where there is a movement of goods under a duty suspension arrangement a guarantor is required:

**"Article 18**

1. The competent authorities of the Member State of dispatch, under the conditions fixed by them, shall require that the risks inherent in the movement under suspension of excise duty be covered by a guarantee provided by the authorised warehousekeeper of dispatch or the registered consignor.

2. By way of derogation from paragraph 1, the competent authorities of the Member State of dispatch, under the conditions fixed by them, may allow the guarantee referred to in paragraph 1 to be provided by the transporter or carrier, the owner of the excise goods, the consignee, or jointly by two or more of these persons and the persons mentioned in paragraph 1..."

53. Article 7 provides that excise duty becomes chargeable at the time, and in the Member State, when it is released for consumption, including where an irregular departure from a duty suspension arrangement occurs:

**"Article 7**

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

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

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

54. Article 8 provides that where there is a movement of goods under a duty suspension arrangement and an irregularity occurs then the liability for that duty falls on a number of parties including the guarantor and that liability is joint and several:

**“Article 8**

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

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

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

2. where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt”

55. Article 10 gives effect to preamble (11) and determines where the release for consumption is deemed to occur in the event of an irregularity in the movement of goods under a duty suspension arrangement:

**Article 10**

1. Where an irregularity has occurred during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), the release for consumption shall take place in the Member State where the irregularity occurred.

2. Where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), and it is not possible to determine where the irregularity occurred, it shall be deemed to have occurred in the Member State in which and at the time when the irregularity was detected.

...

4. Where excise goods moving under a duty suspension arrangement have not arrived at their destination and no irregularity giving rise to their release for consumption in accordance with Article 7(2)(a) has been detected during the movement, an irregularity shall be deemed to have occurred in the Member State of dispatch and at the time when the movement began, unless, within a period of four months from the start of the movement in accordance with Article 20(1), evidence is provided to the satisfaction of the competent authorities of the Member State of dispatch of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.

...

6. For the purposes of this Article, ‘irregularity’ shall mean a situation occurring during a movement of excise goods under a duty suspension arrangement, other than the one referred to in Article 7(4), due to which a

movement, or a part of a movement of excise goods, has not ended in accordance with Article 20(2).”

56. The Directive was implemented in the UK by the 2010 Regulations. It was common ground between the parties that there was no difference between the effect of the provisions in the Directive and the 2010 Regulations. The relevant provisions of the 2010 Regulations are set out in the Appendix to this decision but I will consider this appeal on the basis of the provisions of the Directive.

#### THE ISSUES IN THIS APPEAL

57. At the start of the hearing Mr Baig advised the Tribunal that the appellant was not pursuing a number of arguments that had featured in correspondence, the notice of appeal and his skeleton argument.

58. The arguments no longer being run by the appellant were:

(1) Whether it was procedurally unfair for HMRC to issue the assessment of 23 February 2017 prior to the expiry of the period of one month referenced in Regulation 81(4) of the 2010 Regulations.

(2) Whether HMRC should in the circumstances have applied its legal discretion and not issued an assessment.

(3) Whether the confirmation received by the appellant through the EMCS system was conclusive as to the goods being delivered, in accordance with Article 28. The appellant withdrew this argument in light of the decision of the Court of Appeal in *Logfret (UK) Limited v HMRC* [2020] EWCA Civ 569.

59. HMRC have been clear throughout this dispute and Mr Carey repeated in the hearing that there is no allegation of criminal behaviour on the part of the appellant. The appellant’s potential liability arises solely as a result of having given the guarantee.

60. As it is agreed there has been an irregularity, the sole issue remaining in this appeal is the application of Article 10 and Regulations 80 and 81 in determining where an irregularity is deemed to occur and whether HMRC are entitled to assess the appellant under its excise guarantee or whether it is for the Italian authorities to do so.

61. It is the appellant’s argument in summary that:

(1) The discovery of the Seized Vodka in Sheffield is irrelevant because it was counterfeit vodka and cannot be said to amount to the detection of an irregularity.

(2) It is not possible to determine where the irregularity occurred.

(3) The irregularity leading to the Meridian Vodka being deemed to be released for consumption was detected by the Italian authorities in Italy as they discovered that the goods failed to arrive at La Cave. Article 10(2) therefore deems the irregularity to have occurred where it was detected, that is to say in Italy.

(4) As Article 10(2) applies, Article 10(4) therefore does not apply and HMRC are not entitled to assess the appellants, the duty being assessable by the Italian authorities.

62. HMRC’s argument may be summarised as follows:

(1) The burden of proof is on the appellant in this appeal.

(2) The discovery of the Seized Vodka amounts to a detection of an irregularity in the UK and the appellant has not produced any evidence that the goods ever left the UK. Accordingly, the appellant is liable under Article 10(2).

(3) In the alternative, Article 10(4) applies. The Italian authorities did not detect an irregularity during the movement of the goods for the purposes of Article 10(4). They were investigating widespread fraud and simply provided information to HMRC about a number of movements that did not arrive at La Cave.

(4) It is therefore not possible to determine where the irregularity occurred, all that is known is that the goods did not arrive at La Cave, they were fraudulently received on EMCS and so there must have been an irregularity. Accordingly, Article 10(4) determines the irregularity to have occurred in the UK.

(5) On either basis HMRC is entitled to assess the appellant under the guarantee.

## **DISCUSSION**

63. The issue in this appeal concerns the proper interpretation and application of Article 10.

64. As I have found that the Seized Vodka was counterfeit it is necessarily the case that its discovery does not amount to a detection of an irregularity. I therefore accept the appellant's argument on this point and there is no need to consider the Seized Vodka further.

65. Having done so the issue becomes the interpretation of Article 10 in circumstances where it is common ground there has been an irregularity but there is no evidence of it, save that the tax authorities in the country of destination identified that the goods never arrived in the warehouse to which they were destined.

### **Article 10**

66. Article 7 makes it clear that goods are subject to excise duty in the Member State where the release for consumption occurs, including where that release occurs due to an irregularity. Article 10 determines where, upon the occurrence of an irregularity in the movement of goods in a duty suspense arrangement as defined by Article 10(6), the goods are to be treated as being released for consumption. In short, the deeming rules in Article 10 determine which tax authority has the right to assess the duty payable as a result of an irregularity.

67. Article 10 is reflected in Regulations 80 and 81 of the 2010 Regulations, specifically Article 10(1) and 10(2) are repeated in Regulation 80 and Article 10(4) in Regulation 81.

68. Article 10 provides a series of tests as to how to determine the Member State in which an irregularity is treated as occurring and it is necessary to consider each. Article 10(1) is introductory provision, repeating the point in Article 7(2)(a) that the release for consumption shall take place in the Member State where the irregularity occurred but the test for where it occurs is set out in the remaining provisions of Article 10, specifically in this appeal Articles 10(2) and 10(4).

### **Article 10(2)**

69. Article 10(2) provides that where an irregularity has been detected and it is not possible to determine where the irregularity occurred, it is deemed to have occurred in the Member State in which the irregularity was detected:

“2. Where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), and it is not possible to determine where the irregularity occurred, it shall be deemed to have occurred in the Member State in which and at the time when the irregularity was detected.”

70. In the current appeal the appellant argues that an irregularity was “detected” by the Italian authorities but it is not possible to determine where it occurred and so the irregularity is deemed to occur in Italy.

71. HMRC say the Italian authorities did not detect the irregularity. They were investigating widespread fraud associated with the La Cave not looking for irregularities in individual movements of goods. They simply provided information to the UK authorities and the investigations were completed by HMRC sometime later. It was HMRC who detected the irregularity.

72. I was taken to a decision of this Tribunal in *Anglo Overseas Limited* [2008] UK VAT (Excise) E01090 which concerned the predecessor legislation and specifically paragraph [69]:

“69. The Directive does not make it clear what is meant by "detected", and regulation 3(4) of DSMEG, rather unhelpfully, merely gives "detection" the same meaning as it has in article 20.2. It seems to me that I must give the words their ordinary meaning. Mr Chaisty's argument depends for its success on my being persuaded that, for example, the Italian authorities' discovery of Mr Baldesi's deception amounts to the detection of an irregularity in respect of the consignments supposedly sent to Serio, but in my view that cannot be so. The Italian authorities knew nothing of those consignments (and the Portuguese, Spanish and Belgian authorities nothing of the consignments purportedly sent to their countries) until HMRC made enquiries about them. On any reasonable view, it was HMRC which detected the irregularities; the overseas authorities did no more than provide evidence. I am not persuaded that there is any basis on which it might be concluded that article 20.2 places the duty point in a country other than the UK.”

73. The appellant argued that in *Anglo Overseas* the investigation was the other way round, with HMRC making enquiries of the other tax authorities. In this appeal, the Italian authorities found everything out and told HMRC.

74. Both parties relied upon the decision of the Court of Appeal in *Logfret*. The case concerned a slightly different issue on the construction of Article 10 but it is worth setting out at length some relevant observations of Sir Timothy Lloyd in giving the decision of the Court:

“18. Article 10 deals with the consequences of irregularities and lays down the basic rule that the release for consumption (which gives rise to a charge to duty under Article 7) occurs in the Member State where the irregularity occurred. Thus, if the goods travelled properly out of the United Kingdom but were diverted from their proper course and custody in France, then duty is chargeable in France. However, it may not be possible to determine where the irregularity occurred. That case is covered first by Article 10(2). This deals with the case "where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement", but it is not possible to determine where the irregularity occurred. In that case it is deemed to have occurred in the Member State where, and at the time when, it was detected.

19. A different case is dealt with by Article 10(4). Here, as the paragraph reads, no irregularity giving rise to a release for consumption under Article 7(2)(a) has been detected during the movement, but the goods have not arrived at their destination. The provision is that an irregularity is deemed to have occurred in the Member State of dispatch, at the time when the movement began, unless within four months of the start of the movement, satisfactory evidence is provided either of the regular arrival of the goods, so that the movement is shown to have ended in accordance with Article 20(2), or of the place where the irregularity occurred, so as to bring Article 10(1) into play. This is the provision which lies at the centre of the main issue in the present case...

**When does a movement of goods under a duty suspension arrangement come to an end?**

28. This question lies at the heart of some of the present issues. Article 20(2) shows that it shall end in the relevant case where the consignee has taken delivery of the excise goods. However, in a typical case of diversion of the goods (of which Movements 1, 2 and 3 seem to be examples) the goods never do reach the consignee, so the end of the movement provided for in that Article will not occur. Can it follow that the movement continues indefinitely? That idea seems nonsensical. Article 7(2)(a) provides that excise goods are released for consumption when they depart from a duty suspension arrangement, including on an irregular departure. A regular departure following a movement will occur after delivery to the consignee. An irregular departure is likely to prevent the goods ever reaching the consignee, and will give rise to an immediate charge to excise duty under Article 7(1). Surely, if goods have departed from a movement under a duty suspension arrangement, the movement cannot be treated as still continuing? Article 7 does not deal only with goods that are being or have been moved under a duty suspension arrangement. In Article 7(3) which does relate to goods moving under such an arrangement, it deals with cases of regularity not irregularity. But it seems to me that where all the excise goods comprised in a particular movement have departed irregularly from that movement, for example by being improperly removed from the relevant means of transport, that movement cannot be treated as still continuing. The goods will never reach the intended destination, so Article 20(2) will never be satisfied, but the movement has, and must be treated as having, come to an end, at the moment of the departure of the goods from the duty suspension arrangement, which is also the moment at which duty becomes chargeable. I agree with paragraph 44 of the UT's decision on this point....

**Detection of an irregularity during a movement of excise goods**

31. Another important question is this: what is meant by the phrase in Article 10(2) "where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement giving rise to their release for consumption"? Such an irregularity means a departure of the goods from the duty suspension arrangement: see Article 7(2)(a). For reasons just explained, this brings the movement to an end as regards the goods so departing. In what circumstances could that irregularity be detected during the course of the movement? The course of the movement does no doubt include the moment at which the movement ends, so that if the diversion of the goods were detected while it was happening this could be a detection during the course of the movement. In any other circumstances, the detection must occur after the irregularity has occurred, and therefore after the movement has come to an end at least as regards the particular goods, but often as regards the entire consignment. Article 10(2) itself shows that this must have been envisaged and provided for, because it speaks of an irregularity having been detected during a movement but of it being impossible to determine where the irregularity occurred. Thus it is manifestly not concerned with the case where the irregularity is detected as it is happening, the guilty persons being caught red-handed, and it must include the case of detection after the event, by which time at least some, and in many cases all, of the goods have gone.

32. In my judgment the correct interpretation of this phrase, as was contended for by Miss Simor Q.C. for HMRC, is that the irregularity has to occur during the movement, which may include the case where it is the irregularity that brings the movement to an end, but the detection may occur later. Otherwise

the circumstances provided for in Article 10(2) could never occur. The same applies to the similar words in Article 10(4). That is supported by the wording of paragraph (11) of the Preamble, cited above (paragraph 15)....

### **Conclusion**

67. I therefore hold as follows:

(i)...

(ii) A movement of excise goods under a duty suspension arrangement comes to an end, as regards all or any of the goods comprised in the movement, if and when those goods are released for consumption on an irregular departure from the duty suspension arrangement, for example on being delivered to a location other than the specified tax warehouse.

(iii) The phrases in Article 10(2) and (3) referring to an irregularity being detected during a movement must be understood as referring to the detection, whether during or after the movement, of an irregularity occurring during the movement. An irregularity which brings the movement to an end occurs during the movement.”

75. It is clear, and accepted by all parties, that there was an irregularity in this appeal as there was a diversion of the Meridian Vodka during its movement from the appellant’s premises to La Cave. What is not known is the nature of the irregularity, that is to say, how and where this took place.

76. It is clear that the realisation by the Italian authorities that the goods were not delivered as intended is not in itself the irregularity for the purposes of Articles 7 and 10. The distinction between the detection and the irregularity is drawn out by the Court of Appeal in *Logfret*. Thus the irregularity that must occur “during the movement” but the detection can happen later ([31]-[32] and [67(iii)]).

77. I find that the Italian authorities “detected” that there must have been an irregularity for the purposes of Article 10. They told HMRC that there has been an irregularity and HMRC had to follow up with the appellant but it is not correct to describe HMRC’s activities as detecting the occurrence of the irregularity.

78. However, there remains a question as to whether what the Italian authorities detected is sufficient to amount to say they had detected “an irregularity”. Thus, for Article 10(2) to be engaged does it require the precise nature of the irregularity to be known by the party detecting it or it is sufficient for that party merely to know that, the goods not having arrived, there must have been an irregularity of some kind. Before considering that issue it is relevant to consider Article 10(4).

### **Article 10(4)**

79. Article 10(4) provides that where goods have not arrived at their destination and no irregularity has been detected then the irregularity is deemed to occur in the Member State of dispatch:

“4. Where excise goods moving under a duty suspension arrangement have not arrived at their destination and no irregularity giving rise to their release for consumption in accordance with Article 7(2)(a) has been detected during the movement, an irregularity shall be deemed to have occurred in the Member State of dispatch and at the time when the movement began...”

80. Article 10(4) also provides a mechanism for a taxpayer to provide evidence of dispatch but the appellant did not do so in this matter and so the issue is not in point.

81. The appellant argues that the Italian authorities detected the irregularity when the goods failed to arrive at La Cave so Article 10(4) cannot apply. In any event Article 10(2) applies.

82. HMRC argue that the goods clearly did not arrive but the Italian authorities' surveillance does not amount to an irregularity being "detected during the movement". As described above, HMRC's argument is that the Italian authorities simply obtained information and provided it to the UK. Accordingly the irregularity should be deemed to occur in the Member State of dispatch, being the UK.

83. In my view, as the goods did not arrive at their destination, La Cave, Article 10(4) applies if it can be said that no irregularity during their movement was detected by the Italian authorities. I have found that the Italian authorities detected that an irregularity must have occurred. Again, as described at paragraph 77 and 78 above in relation to Article 10(2), the issue becomes the meaning of detecting an irregularity and whether it is sufficient to know that one must have occurred or is more information required.

### **Detecting an irregularity**

84. To summarise, is my view that this appeal turns on which of one of the following propositions are correct:

- (1) "an irregularity has been detected" by the Italian authorities: if so Article 10(2) applies and the appellant succeeds
- (2) "no irregularity...has been detected": if so Article 10(4) applies and the appellant's appeal fails

85. Specifically, the issue is whether Article 10 requires the precise nature of the irregularity to be known or it is sufficient for it to be known that, the goods not having arrived at La cave, an irregularity must have occurred.

86. The Italian authorities knew at the time of writing the Detention Order if not earlier:

- (1) that the appellant had shipped the Meridian Vodka to La Cave as they had the ARC number.
- (2) the goods never arrived.
- (3) the receipt was falsely entered in EMCS.

87. However, no one knows how or where the diversion took place.

88. No authority was presented to me on this point and the point is difficult. There is no suggestion that the provisions in Article 10 apply in any order of priority, indeed, Sir Timothy Lloyd in *Logfret* does not envisage any overlap ([19]). The same point was made by the Upper Tribunal ([2018] UKUT 422(TCC) at paragraphs [33]-[35]).

89. However, the descriptions given by Sir Timothy Lloyd of Articles 10(2) and 10(4) both apply in this appeal.

90. Thus, describing Article 10(2) at [18]:

"...if the goods travelled properly out of the United Kingdom but were diverted from their proper course and custody in France, then duty is chargeable in France. **However, it may not be possible to determine where the irregularity occurred. That case is covered first by Article 10(2).**"  
(emphasis added)

91. Article 10(4) is described at [19]:



“A different case is dealt with by Article 10(4). Here, as the paragraph reads, no irregularity ...has been detected during the movement, but the goods have not arrived at their destination...”

92. Only one of Articles 10(2) and 10(4) can apply. In my view on balance the natural reading of Article 10 is to require the nature of the irregularity to be known, not just that an irregularity must have occurred. If that were not the case then Article 10(4) would be redundant. Thus if, as required by Article 10(4), goods have not arrived at their destination then necessarily an irregularity has occurred. That fact would be known by one or more tax authorities, if only because an assessment would have been raised. If a tax authority knowing that goods have not arrived amounts to detecting an irregularity then the second condition for the application of Article 10(4), that the irregularity has not been detected, cannot be satisfied.

93. That cannot be the case and in my view Article 10940 best applies to the facts of this appeal.

#### **DECISION**

94. I have found that the Seized Vodka was counterfeit and so cannot be the basis of an assessment by HMRC.

95. However, in my view Article 10(4) applies to the movement of the Meridian Vodka which is the subject of this appeal. The goods did not arrive at their destination and no irregularity giving rise to their release for consumption has been detected, save the inference that one must have occurred because the goods did not arrive.

96. For the reasons set out above, I therefore dismiss this appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

97. 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.

**IAN HYDE  
TRIBUNAL JUDGE**

**RELEASE DATE: 27/05/2021**

## Appendix

### 1. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010

1. Regulation 5 provides insofar as relevant:

“5. Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.”
2. Regulation 6 provides insofar as relevant:

“6(1) Excise goods are released for consumption in the United Kingdom at the time when the goods—

  - (a) leave a duty suspension arrangement...”
3. Regulation 7 provides insofar as relevant:

“7(1) For the purposes of regulation 6(1)(a), excise goods leave a duty suspension arrangement at

the earlier of the time when—

...(h) there is an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom...”
4. Regulation 9 provides insofar as relevant:

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

  - (a) in a case where a guarantee was required in accordance with regulation 39, the person who provided that guarantee...”
5. Regulation 39 provides insofar as relevant:

“39(1) Except for movements between tax warehouses which the Commissioners may specify in a notice, excise goods may not be moved under duty suspension arrangements unless—

  - (a) the risks inherent in the movement are covered by an approved guarantee provided by the authorised warehousekeeper of dispatch, the registered consignor or any other person the Commissioners may allow in accordance with paragraph
  - (2) which secures such amount of the duty chargeable on the goods as the Commissioners may require...”
6. Regulation 80 provides insofar as relevant:

“80 (1) This regulation applies where—

  - (a) excise goods are moved under a duty suspension arrangement; and
  - (b) in relation to those goods and that movement, there is an irregularity which occurs or is detected in the United Kingdom.

(2) Where an irregularity occurs in the United Kingdom, the excise goods are released for consumption in the United Kingdom at the time of the irregularity or, where it is not possible to establish when the irregularity occurred, the time

when the irregularity is detected or first comes to the attention of the Commissioners.

(3) Where an irregularity is detected in the United Kingdom but it is not possible to establish in which Member State the irregularity occurred, it shall be deemed to have occurred in the United Kingdom and at the time it is detected or first comes to the attention of the Commissioners.

(4) Where the circumstances mentioned in paragraphs (2) or (3) apply, and the goods were dispatched from another Member State, the Commissioners must inform the competent authorities of that State.”

7. Regulation 81 provides insofar as relevant:

81(1) This regulation applies where—

- (a) there is a movement of excise goods under a duty suspension arrangement;
- (b) the movement starts in the United Kingdom;
- (c) the movement is not discharged by the arrival of the goods at their stated destination; and
- (d) no irregularity is detected in the course of the movement.

(2) Where this regulation applies an irregularity shall be deemed to have occurred, and the goods accordingly released for consumption, in the United Kingdom at the time when the movement started.

(3) Paragraph (2) does not apply if, within four months of the start of the movement, the person (“P”)—

- (a) who guaranteed payment of the duty in accordance with regulation 39; or
- (b) where no guarantee was required, the consignor of the goods, satisfies the Commissioners that—

- (a) the goods have arrived at their stated destination; or
- (b) there has been an irregularity in another Member State.

(4) If, at the time P is informed by the Commissioners that the excise goods have not arrived at their stated destination, P does not know, or could not reasonably have known, that the goods have not so arrived, P may, no later than one month after that time, provide evidence to satisfy the Commissioners that—

- (a) the goods have arrived at their stated destination; or
- (b) there has been an irregularity in another Member State.

(5) Where the Commissioners are satisfied with any evidence provided in accordance with paragraph (4), paragraph (2) does not apply.

(6) In this regulation “stated destination” means the destination stated in—

- (i) the electronic administrative document...”

## **2. The Finance Act 1994**

1. Section 12(1A) provides insofar as relevant:

“... where it appears to the Commissioners—

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

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

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

2. Section 13A(2) provides insofar as relevant:

“13A—Meaning of “relevant decision”

...

(2) A reference to a relevant decision is a reference to any of the following decisions—

(a) ...

(b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above;

(c) ...”

3. Section 16(5) of the Finance Act 1994 provides insofar as relevant:

“(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.”