



Neutral Citation: [202] UKFTT 129 (TC)

Case Number: TC08734

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal reference: TC/2021/01165

Excise Duty - whether excise duty was due on Chinese cooking rice wine-yes-whether valid assessments were made against the importer-yes-whether there was a valid in time notification of joint and several liability-yes- whether the import agent was jointly and severally liable for the unpaid and undeclared excise duty-yes-whether the goods seized in relation to an assessments were assessed in relation to the holding of goods-no-whether the importation of the goods was irregular and whether the import agent was involved-yes. Appeal dismissed.

Finance (No. 2) Act 1992 s1, Finance Act 1994 ss.12 and 16, Alcoholic Liquor Duty Act 1979 ss1 and 55, Council Directive 2008-118/EEC arts 7,8 and 9, Excise Goods (Holding, Movement and Duty Point) Regulations 2010/593 regs. 6,10,12and 13

**Heard on 28 and 29 November 2022
Judgment date: 14 February 2023**

Before

**TRIBUNAL JUDGE RUTHVEN GEMMELL WS
NOEL BARRETT**

Between

DSV AIR & SEA LIMITED

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: Barrie Atkin, Counsel

For the Respondents: Simon Pritchard, Counsel

DECISION

INTRODUCTION

1. The form of the hearing was by video, and all parties attended remotely, and the remote platform used was the Tribunal video hearing system. The documents which were referred to comprised of a Hearing bundle of 1182 pages, an Authorities bundle of 361 pages, a Witness Statements and Exhibits bundle of 127 pages, skeleton arguments for both parties and speaking notes for closing submissions on behalf of HMRC.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. The Appellant, DSV Air & Sea Limited (“DSV”), appealed against two assessments issued by the Respondents (“HMRC”) to GWY International Trading Ltd (“GWY”), which is now in liquidation, for which HMRC deemed that DSV was jointly and severally liable in respect of the importation of quantities of a product known as Chinese rice cooking wine, called Shaoxing, (“the Product”)
4. The first assessment with the reference number EXA 688/19, (“Assessment 1”) in the sum of £193,509 was dated 19 November 2019.
5. The second assessment with the reference number EXA 50/20, (“Assessment 2”) in the sum of £1,547,776 was dated 30 June 2020.
6. The amount in the notice of appeal was £1,741,285.
7. DSV is a global transport and logistics company and acted as an import agent for GWY in respect of certain importations of the Product to which the assessments related.
8. The Product was subject to duty as a kind of excise goods, namely ‘made wine.’
9. The Tribunal heard evidence from Nick Beauchamp (formerly known as Nikita Alexandrovich Vetitnev) (“NB”) a senior manager of Customs and Security for DSV, who had provided two written witness statements and Matthew Griffen, (“MG”) an Officer of HMRC in the Alcohol and Tobacco Team, Taskforces and Specialist Compliance. The witnesses were examined, cross examined and re-examined.

Facts and Evidence

10. On 30 November 2018, Officers of HMRC, including MG, attended the premises of GWY, located at Unit 6, Maritime Enterprise Park, Bootle, L20 4DY. During that visit, 86,372 litres of the Product was identified that had been imported without excise duty having been paid. It was accessible and visible on pallets. HMRC therefore seized the Product (“the seized Product”), under section 139 of the Customs and Excise Management Act 1979 (“CEMA”).
11. GWY did not appeal the seizure and ceased trading in early 2020. GWY use a different agent for some of its imports.
12. As regards the seized Product, records provided to HMRC by GWY, and DSV showed that DSV acted as import agent for GWY in relation to 71,060 litres of the Product. The remaining part of the seized Product (15,312 litres) was imported by a different import agent and is not subject to this appeal.

13. In its capacity as GWY's import agent, DSV completed all necessary steps on GWY's behalf to import the Product, including completing C88 declarations.

14. MG issued two assessments to GWY in respect of the seized Product. Only Assessment 1 is relevant to this appeal.

15. Assessment 1, issued on 21 November 2019, and sent to DSV when advising them that they were jointly and severally liable, contained an error in stating that the net amount due to HMRC was £44,198.00. HMRC say that this was clerical error and that the correct amount due to them was £193,509 as shown under the heading 'Duty/Penalty due to HMRC'.

16. During the relevant tax year for Assessment 1, the duty rate for made wine exceeding 5.5% but not exceeding 15% Alcohol By Volume ("ABV") was £288.65 per hectolitre. Since the Product had been imported in litres it was necessary for HMRC to convert the amount into hectolitres by dividing by 100, for the purpose of calculating the applicable duty. The excise duty amount was, therefore, calculated as follows: $710.60\text{HL} \times 288.65 = \text{£}205,114$, less the duty already paid of £11,605. Accordingly, the total excise duty owed under Assessment 1 was £193,509.

17. MG issued two further assessments to GWY on 30 June 2020, Only Assessment 2 is relevant to this appeal.

18. Assessment 2 was calculated in respect of the Product that was imported, by DSV on behalf of GWY, between 17 October 2016 and 6 June 2018. Documents provided to HMRC by DSV on 3 July 2019, recorded that 542,120.80 litres of the Product was imported by DSV within 17 separate importations. HMRC identified that excise duty had not been paid.

19. MG determined as part of his calculations that since Assessment 1 related to 71,060 litres of the seized Product in November 2018, the rest of the Product that had been imported during that period (12,340 litres – imported on 6 June 2018) was assessed as part of Assessment 2.

Notification of joint and several liability to DSV

20. By a letter dated 17 September 2020 (sent to DSV on 22 September 2020), MG notified DSV that they were jointly and severally liable to pay excise due in respect of Assessments 1 and 2 which HMRC said was because the importation was irregular.

Case progression post notification of decision to DS

21. On 15 January 2021 DSV's representative requested a review of HMRC's decision. By a letter dated 24 February 2021, the decision of MG was upheld.

22. Under s.55(1) of the Alcoholic Liquor Duty Act 1979 ("ALDA 1979"), excise duty is charged on "made-wine" imported into the UK. The strength of the Product at 14% ABV exceeded 5.5%ABV but did not exceed 15% ABV. Accordingly, by Schedule 1 of ALDA 1979, the applicable rates of duty per hectolitre at the relevant time was:

a. from 13 March 2017: £288.65.

b. from 21 March 2016 to 12 March 2017: £277.84.

23. DSV's standard practice was to obtain the commodity code and a description of the product to be imported from their client/consignee, in this instance GWY.

24. NB gave evidence in relation to his role at DSV. He stated that he primarily advised DSV on goods liable to customs and excise duties and stated categorically he did not provide advice or confirmation of tariff amounts or commodity codes to the customers of DSV, including GWY.
25. NB stated that the normal method of calculating alcohol duty on wine and made wine is to find the statutory rate applicable to the product. There are specified bands of alcohol by volume (ABV) and the rate differs from band to band.
26. The rate of duty is specified to apply “per hectolitre” of product and it is a simple matter to ascertain which band the product is in and to apply the specified rate to the number of hectolitres of product.
27. The rate of duty is referable to a commodity code which is input to HMRC’s Customs Handling of Import and Export Freight system (“CHIEF”).
28. When doing so CHIEF advised that duty on the Product, with the commodity code 2103909080, should be calculated per hectolitre of alcohol within the product, rather than of the Product. This produced a far lower excise duty charge.
29. NB stated that there were thousands of commodity codes and in the case of a composite product such as a sauce, similar to the Product, it can be necessary to carry out a manual calculation rather than simply enter a code and receive a response from CHIEF.
30. NB estimated that a total of about 40 declarations had been made for GWY although some of those related to sesame seed oil. He had no contact with GWY directly.
31. Whereas NB was aware that importing wine is generally an excise matter, the Product was not classified as a wine but as a sauce. NB evidence that he did not recall looking at Notice 41: Alcoholic Ingredients Relief (“Notice 41”). The notice contained details about “*Alcoholic Ingredients Relief*” (“the Relief”) – a form of relief that can be claimed by, amongst others, those who provide alcohol which is subsequently used to produce eligible articles.
32. In any event, DSV would only advise a customer that such a notice exists and not advise on its applicability.
33. NB was aware that there were specialist teams at HMRC that could be contacted for clarification in relation to Notice 41 but he did not consult them. He did not follow decisions of the EU court in relation to customs and excise matters but relied on HMRC to advise his company.
34. NB set out the mechanics of how he operated the customs declaration system. The system used was called “ICE” and was provided and maintained by a large software provider (Descartes LLC).
35. NB understood that this and similar systems are required to conform to basic criteria stipulated by HMRC before HMRC will allow them to be used to make import declarations on the CHIEF system. Descartes LLC were on a published list of software developers who provide software that enable customers to make declarations on CHIEF.
36. GWY had first approached DSV in February 2016 to arrange the movement of goods and the typical products being imported were blended sesame oil and the Product.

37. There followed an extensive exchange of emails between NB, his DSV colleagues, principally Diane Lowe, Iris Bannister, Tony Shires, Phil Evans and Lesley Clifford; Stephen Wang, the director of GWY; Darren and possibly others at HMRC CHIEF operations and tariff management.
38. The first correspondence between DSV and GWY involved an email from Steve Wang, of GWY, to DSV on 18 February 2016 which explained that they were looking to arrange the movement of the Product.
39. NB sought to clarify the commodity code for the Product using a suggested commodity code of 2206008900 (other fermented beverage) provided by Iris Bannister, an import manager of DSV, and also stated that in his opinion excise duty needed to be applied based on the amount of or cohort by volume.
40. NB's initial instinct was that excise duty would be applicable although it would be necessary to establish the actual amount payable. In forming an opinion of the appropriate commodity code, NB referred to HMRC's tariff information and looked at what might be similar products available on the European Union website.
41. The nature of the Product meant there was genuine uncertainty as to whether these goods were excisable, depending on whether they were akin to alcohol (where excise duty could reasonably be expected to be paid) or to sauces (on which excise duty would not be expected to be paid). NB consulted, Phil Evans, his senior customs manager, to whom he reported.
42. On 9 March 2016, Tony Shires, an import clerk with DSV, expressed the belief that the commodity code for the Product was 2206008900. GWY had provided DSV with 3 different commodity codes being 2209001100 (vinegar), 2209001900 and 2103909080 (sauces) as it was standard practice for DSV to obtain in writing from customers the commodity code to use for a particular shipment.
43. GWY sent a signed authority, dated 09 March 2016, appointing DSV to act as a direct representative for customs clearance activities, which DSV considered acted to transfer responsibility from the agent (DSV) to the consignee (in this case GWY), and referred to HMRC's tariff classification service which gave an opinion that the commodity code was 2103909080 (sauces).
44. The first import of the Product, to which this appeal relates, was on or about 17 October 2016 with further imports occurring until about 06 June 2018.
45. On 23 October 2017, DSV received a message on CHIEF stating that "goods are cooking wine, not sauces, please amend your commodity code". DSV contacted GWY to clarify the code. GWY replied attaching an email from "HMRC Classification Enquiries Unit" to Mark Lees, of another company from DSV, in relation to a similar or same product which stated: "Thank you for your email enquiry for 2103909080 as detailed below. From the information you have supplied in your email, my advice is that the goods would be classified in:2103909080". It was specifically stated in HMRC's email that this was based on the information that been provided and was non-binding.
46. DSV's emails indicate that in August 2018, there was discussion regarding the completion of online declarations regarding certain goods under customs classification to 2103909080 (a classification referring to: "Sauces and preparations therefor; mixed

condiments and mixed seasonings; mustard flour and meal and prepared mustard ...Other...Other”).

47. The next issue that arose was when DSV utilised the commodity code 2103909080 it did not contain an excise line alerting DSV to the possibility that excise was due. Even in 2018, DSV say, the same commodity code showed that excise duty only applied to between 15 to 22% ABV. As the ABV of the Product was 14%, it appeared to DSV that no excise applied to the Product, notwithstanding that with effect from 1 January 2018 excise on the Product was due if the alcohol by volume was greater than 5%.

48. DSV and NB placed great trust in the HMRC official tariff (volume 2) online and in CHIEF which were the key advisory tools that customs professionals use in practice.

49. On 8 August 2018, (about 1 year and 10 months after the first import which this appeal relates), NB emailed HMRC CHIEF Operations and Tariff Management to clarify if the commodity code for the Product/Rice Cooking Wine (but not in relation to the importation to which this appeal is concerned) was set correctly in CHIEF and regarding the excise duty line.

50. There followed internal discussions within DSV and in particular the requirement that to declare excise duty it was necessary to declare this in “box 47”. There was also an error in segment 40 and NB questioned whether the measurement in box 47 should be calculated on the basis of litres of pure alcohol or alternatively litres of net Product.

51. On 9 August 2018, the CHIEF system continued to transmit errors regarding the issues with segment 40 7B and whether the base amount for the base quantity should be entered. Nevertheless, DSV were aware that excise duty was due on the Product.

52. ‘Darren’ at ‘HMRC CHIEF (OE) operations’ responded advising that “as there is no excise line against the Commodity Code, you are required to enter a composite excise tax line”. NB thought that Darren was knowledgeable in this area.

53. NB stated that DSV has been badly misled by HMRC and by the CHIEF system and it, therefore, took over 2 years for correct information to be provided by HMRC in relation to this matter.

54. On 9 August 2018, DSV also made GWY aware that excise duty was due on the Product and requested the percentage of alcohol for the shipments. The first entry where excise duty was recorded was on 10 August 2018 but this was underpaid due to an error in the calculation used.

55. On 13 August, DSV sent GWY a copy of Notice 41. Whilst the version of Notice 41 sent to GWY was issued on 28 July 2017, the Notice was first published on 1 April 2013.

56. An internal email dated 13 August 2018 referred to the potential for GWY to reclaim excise duty via the Relief but it also explained that due to the lack of information around GWY’s processes in relation to the Product, DSV was unable to advise:

“Products produced by cooking-in this case would refer to cooking wine being used in a production process leaving little or no alcohol in the final product (whatever the final product GWY is producing). There would need to be evidence of the manufacturing process showing this. Trader must also be able to prove that the alcohol for which the claim is made is the same alcohol that has been included in the eligible article. If GWY are not the manufacturer they need to refer to section 4 of the same notice. However I

am not aware what is the process GWY undertakes on this goods so unable to advise fully...”

57. On 13 August 2018, NB queried with NCH Technical at HMRC regarding the calculation of the excise duty under the Commodity Code 2103909080. He queried the difference between the excise duty per hectolitres of Product versus the commodity code footnote that stated the duties were calculated per litre of alcohol. NB’s concern was that it was not clear to him whether excise duty applied per litre of Product or alcohol.

58. On 15 August 2018, DSV emailed HMRC with a query about the calculation of excise duty on the Product.

59. On 30 November 2018, MG attended GWY’s premises. During the visit, GWY explained to MG that GWY relied upon DSV in relation to all duties that were payable on import.

60. During the visit, MG discovered that excise duty had not been calculated properly on two specific imports of the Product. GWY referred MG to DSV and during the visit a telephone call took place between MG and DSV. On the call, DSV explained to MG how it had calculated the excise duty and MG explained that the formula it had used was wrong. In relation to the rest of GWY’s imports of the Product, GWY was unable to show that any excise duty had been paid.

61. HMRC seized the Product that was on GWY’s premises. As there was no request for a condemnation hearing, the goods were forfeited to the Crown on or about 30 December 2018.

62. On 31 January 2019, Campden BRI issued a report on four samples of the Product seized by HMRC. The test results showed that the Product had an ABV of between 12.0% and 13.8%.

63. On 3 July 2019, HMRC requested import documentation from DSV in respect of GWY’s imports and DSV responded on the same day.

64. On 19 November 2019, HMRC assessed the excise duty payable on the seized Product. Considering the small amount of excise duty that had been paid already (£11,605), the assessment (EXA 688/19) was in the sum of £193,509 (“Assessment 1”).

65. On 30 June 2020, HMRC assessed the excise duty payable on the Product where DSV’s records showed that it had imported on behalf of GWY between 17 October 2016 and 6 June 2018 by Assessment 2.

66. On 8 September 2020, DSV emailed HMRC about whether they might consider DSV liable in respect of the Assessments 1 and 2.

67. On 1 September 2020, HMRC indicated that they were holding DSV liable.

68. On 17 September 2020, MG formally notified DSV that HMRC considered DSV liable on a joint and several basis.

69. On 15 January 2021, DSV requested a departmental review. An accompanying letter contained the grounds for the review and a witness statement (from NB) dated 27 January 2021 provided further information.

70. On 24 February 2021, HMRC informed DSV of the outcome of the departmental review: the original decision was upheld because the Assessments were correctly raised and DSV was jointly and severally liable.

71. MG explained that the visit on 30 November 2018 had been made to GWY's premises following information provided by another trader and where no duty had been paid. He confirmed his view that DSV had cooperated with HMRC rapidly and that there had been no deliberate avoidance or evasion by DSV and for this reason no penalties had been charged.

72. MG stated that duty could be assessed on the seized product on MG's visit as they were on pallets in their premises and explained that the default days, both showed 30 November 2018 in Assessment 1, and, therefore, were, on a single day. He stated that the duty point date could have been earlier when the goods were imported but that the assessment does not ask for a duty point but rather a range.

73. MG stated that HMRC's guidance says that if the assessment covers one day it can be used in both columns in the assessment and that in any event the recipient would have seen the duty point was 30 November 2018 as this was clarified in a covering letter of 21 November 2019. This covering letter was not included in the bundle of documents submitted to the Tribunal but on the second day of the hearing a motion to have it included was made by HMRC, which the Tribunal granted.

74. The covering letter stated, "The quantity of goods seized from you on 30 November 2019 was: 86,372 Litres Rice Cooking Wine (Still made wine exceeding 5.5% but not exceeding 15%). The excise duty owed for the seized goods was: £249,312. The excise duty you paid on imports cleared on 10/08/2018 and 16/10/2018 was: £11,605. Due to the quantity of goods held and the dates you made these imports I have deemed these payments to relate to some of the goods you held on 20 November 2018; therefore, the deficit of the excise duty payable on the goods you were holding is: £237,707."

75. It continued "HMDP 2010 Regulation ("Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the Regulation(s)") 6(1)(d) states excise goods are released for consumption in the United Kingdom at the time when the goods are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement. As the goods held by you were not placed immediately under an excise duty suspension arrangement after customs duty was paid and the correct amount of excise duty was not immediately paid, HMDP2010 Regulation 88 made those goods liable to forfeiture. Officers of HM Revenue and Customs therefore seized the goods as liable to forfeiture pursuant to s139 Customs and Excise Management Act 1979 (CEMA79).

76. HMDP 2010 Regulation 12(1) states that the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(d) (importation of excise goods that have not been produced or are not in free circulation in the EU) is the person who declares the excise goods or on whose behalf they are declared upon importation. As you were the person on behalf of whom the goods were declared on importation, you are therefore liable to pay the UK excise duty. I have separated the above total into two assessments; one for each import agent you used to import the goods that were held at your premises on 30 November 2018."

77. Assessment 1, "REF: EXA 688/19 is for the remainder (71060 litres) of cooking wine seized from your premises and imported on your behalf by DSV Air and Sea Ltd and less the duty you paid on these imports to the value of £11,605; this leaves an assessment to the value of £193,509."

78. MG was questioned on the content of the two assessments and the contrast between Assessment 1 and Assessment 2 in respect of the default dates, with the latter showing imports for three different tax years and reason codes.

79. MG stated that he made the excise duty assessments as best judgement but needed the purchase invoices because the documents, the C88 forms that had been made available to HMRC, did not list the quantity of the goods in litres (they only gave weights) nor the ABV of the goods. MG calculated which of the goods he had seized on 30th November were likely to have been imported by DSV on behalf of GWY and which goods were imported by other import agents.

80. On 21 November 2019, MG did not notify DSV of the joint and several liability for the assessments as he was waiting to receive input from HMRC's policy unit as to whether DSV could be considered joint and severally liable. He was aware of HMRC's internal guidance which said that the notification of a joint and several liability excise duty assessment was not subject to a one-year time limit and could be notified when the liability was established.

81. HMRC received all the necessary information from DSV to raise an assessment on 3 July 2019 but at the point of raising an assessment MG had still not received a response from HMRC unit which he was told had been delayed partly as a result of the pandemic.

82. On 3 July 2020 MG concluded his enquiries and was satisfied that the importation of the Product could be considered as irregular and that he had been correct to issue the assessments.

83. As a result of the importations being irregular, he considered that Regulation 12(3) applied, meaning that DSV as the import agents were joint and severally liable to pay the excise duty assessed to GWY for the imports that DSV were involved in.

84. MG issued joint and several letters to DSV by email and letter on 22 September 2020. The letter was dated 17 September 2020.

85. The issues before the Tribunal were (1) whether the Product was subject to a duty of excise on made wine; (2) whether there were valid assessments against GWY; (3) whether there was an 'in time' valid notification against DSV; (4) whether DSV were jointly and severally liable; (5) whether the seized Product was the 'holding of goods' or the 'importation of goods'; and (6) whether the importation of the Product was irregular.

Burden of Proof

86. The Burden of proof is on DSV by virtue of s.16(6) of the FA 1994.

DSV's SUBMISSIONS

Witnesses

87. DSV say that NB is a witness with a detailed technical knowledge dealing with a difficult subject who sought at all times to act appropriately to declare the correct amount of duty. He followed CHIEF which declared no duty and so no duty was apparently payable but his doing so was a genuine error.

88. From August 2018 when he became fully aware that duty was payable, he still had difficulty in obtaining the commodity code information and based on further incorrect advice, the last two shipments showed the incorrect amount of duty payable.

89. DSV say that MG admitted that Assessment 1 was made on the basis that GWY were holding the goods then subsequently stated that the assessment was based on the importation of the goods DSV say the tribunal should disregard this assessment.

No valid assessment on DSV and no liability to duty on their part

90. DSV say that there are no valid assessments and accordingly no liability to duty on the part of the DSV.

91. The assessments which HMRC raised against GWY were raised under s. 12(1A) Finance Act 1994 (“FA 1994”) which was confirmed by HMRC in the review conclusion letter. No assessments have been raised against DSV.

92. The power to make assessments to Excise Duty is given by s. 12, FA1994, which says (so far as material):

- “(1) Subject to subsection (4) below, where it appears to the Commissioners—
 - (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
 - (b) that there has been a default falling within subsection (2) below, the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.
- (1A) Subject to subsection (4) below, where it appears to the Commissioners—
 - (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
 - (b) that 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.”

93. DSV does not dispute that the Assessments 1 and 2 were made within the time limits set out in s. 12(4) of FA 1994 and that they were notified to GWY as the person liable to pay the duty.

94. Section 12 of FA 1994 operates as follows. Both section 12(1) and section 12(1A) say that HMRC may assess: “... where it appears to the Commissioners ... that that person is a person from whom any amount has become due in respect of any duty of excise...”

95. Section 12(3) says “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 and recovered accordingly...”

96. The effect of the section is to permit HMRC to turn its view that a person is or may be liable to pay excise duty into a deemed situation in which the person is treated for all purposes as so liable.

97. As GWY did not appeal against either assessment, GWY was deemed to owe the amounts of duty shown on the assessments. That deemed situation must be treated as *Marshall*

v. Kerr [1993] STC 360 at 366 CA (approved in the House of Lords at [1995] AC 164) where Peter Gibson J. said:

"For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

98. In the absence of anything further, GWY, and only GWY, must be treated as the person who owes the duty referred to in the assessments.

99. Section 1 of the Finance (No 2) Act 1992 ("F(2)A 1992") (which implements Article 7 of Directive 2008/118/EC – "the Directive") enables HMRC to make regulations to fix excise duty points, to specify the person or persons on whom the liability to pay duty is to fall at the excise duty point and to specify whether a liability is joint and several. So far as material, the section says:

"(1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ("the excise duty point").

(2) Where regulations under this section fix an excise duty point for any goods, the rate of duty for the time being in force at that point shall be the rate used for determining the amount of duty to be paid in pursuance of the requirement that takes effect at that point.

(3) Regulations under this section may provide for the excise duty point for any goods to be such of the following times as may be prescribed in relation to the circumstances of the case, that is to say—

(a) the time when the goods become chargeable with the duty in question;

(b) the time when there is a contravention of any prescribed requirements relating to any suspension arrangements applying to the goods;

(c) the time when the duty on the goods ceases, in the prescribed manner, to be suspended in accordance with any such arrangements;

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

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

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

(4) Where regulations under this section prescribe an excise duty point for any goods, such regulations may also make provision—

(a) specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed); and

(b) where more than one person is to be liable to pay the duty, specifying whether the liability is to be both joint and several...”

100. The Regulations are the relevant regulations. Regulation 12 says: -

“(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(d) (importation of excise goods that have not been produced or are not in free circulation in the EU) is the person who declares the excise goods or on whose behalf they are declared upon importation

(2) In the case of an irregular importation any person involved in the importation is liable to pay the duty.

(3) Where more than one person is involved in the irregular importation, each person is jointly and severally liable to pay the duty.”

101. This is the Regulation under which HMRC are purporting to make DSV jointly and severally liable with GWY.

102. Article 8 of the Directive (which the Regulations implement) says who is liable to pay excise duty that has become chargeable. Paragraph 1(d) (which is implemented by Regulation 12) says:

“in relation to the importation of excise goods as referred to in Article 7 (2) (d) [which defines “release for consumption” as the importation of excise goods, including irregular importation] the person who declares the excise goods or on whose behalf they are declared upon importation and, in the case of irregular importation, any other person involved in the importation.”

103. Paragraph 2 of Article 8 says:

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

104. DSV does not dispute that, where a person is liable under Regulation 12(1), to pay excise duty, another person may also be liable under Regulation 12(2) if involved in an irregular importation. That is clear from both the Directive and from Regulation 12.

105. Nor does DSV dispute that Regulation 12(3) provides that where more than one person is involved in the irregular importation, each is jointly and severally liable.

106. DSV say that HMRC have taken the position that they need not assess DSV but can simply notify DSV of joint and several liability as though the operation of Regulations 12(2) and (3) requires no more than an administrative act on their part.

107. The flaw in that position is demonstrated by the structure of the Directive and of Regulation 12. Regulation 12(1) (under which HMRC assessed GWY) provides that liability attaches to the person who declares the goods or on whose behalf they are declared upon importation.

108. As DSV declared the goods on behalf of GWY, it would have been open to HMRC to assess both DSV and GWY under Regulation 12(1), but HMRC did not adopt that course. They assessed only GWY.

109. Regulation 12(2) deals with persons whose actions are not covered by Regulation 12(1) but who had some other involvement in an irregular importation. An obvious example would be a person who imports excise goods without making any form of declaration or assists someone who does so – for example, a lorry driver who drives a cargo through a port of entry where another person has made the declaration or a person who loads or unloads that cargo from the lorry.

110. Accordingly, it is perfectly possible for a person to be liable to excise duty under Regulation 12(2) and not be liable to excise duty under Regulation 12(1) and it is also possible for more than one person to be liable under Regulation 12(2) with none of those persons being liable under Regulation 12(1).

111. It accordingly makes no sense for an assessment to be required to fix liability under Regulation 12(1) (which HMRC do not appear to deny) but not to be required for fixing liability under Regulation 12(2). It is clear from the purported notification of joint and several liability that HMRC's position is that DSV was involved in irregular importations.

112. However, there can be no conceptual difference between Regulations 12(1) and (2) as regards the machinery required to turn HMRC's view that a person is liable to pay duty into an enforceable debt due to the Crown. If that step requires an assessment as regards Regulation 12(1) it must do so for Regulation 12(2).

113. The machinery for doing that is in FA 1994 and there is nothing in Part I of F(2)A 1992 that provides to the contrary or confers a power on HMRC to override that machinery.

114. Regulation 12(3) builds upon Regulation 12(2) by making it clear that each person involved in an irregular importation is jointly and severally liable to pay the duty, permitting HMRC to assess multiple parties under Regulation 12(2).

115. It cannot be argued that F(2)A 1992 or Regulation 12 dispense with the need to assess. A power to make delegated legislation may not be used to amend primary legislation without clear authority, which will usually be express but might exceptionally be implied. See Bennion, Bailey and Norbury on Statutory Interpretation (2020) at 13.2(1).

116. In any event, there is nothing in the Regulations, express or implied, that purports to override the assessment machinery in cases to which Regulation 12 applies.

117. Article 9 of the Directive makes it clear that Excise Duty is to be levied and collected according to the procedure laid down by each Member State, so there is nothing in that Directive to suggest that Community law requires or permits a departure from that procedure.

118. It is noteworthy that in *Canmi Limited v. HMRC* [2020] UKFTT 0016 (TC), HMRC raised 35 assessments against an import agent in respect of alleged joint and several liability under Regulation 12 (see paragraphs [5] and [10] of the report) and apparently did not rely on Regulation 12 alone.

119. By way of alternative, Assessment 1 on its face assesses the Product held at GWY's premises on 30 November 2018 and seized by HMRC on that date. That assessment is accordingly on its true construction an assessment in respect of a release for consumption under Regulation 6(1)(b), arising when goods: "are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid ...".

120. The persons liable in such a case are specified in Regulation 10: "(1) The person liable to pay the duty when excise goods are released for consumption by virtue of Regulation 6(1)(b) ... is the person holding the excise goods at that time. (2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1)".

121. As there is no evidence that DSV has had any involvement in the holding of the Product at GWY's premises, DSV cannot be liable under Regulation 10. Nor can purported liability under Regulation 12 be prayed in support of GWY's primary liability under Regulation 10. See *B & M Retail v R&CC* [2016] STC 2456 at paragraph [137]:

"We accept Mr Baldry's submission that the correct interpretation of s 1(4) of the 1992 Act is that any regulations made pursuant to that power can only impose joint and several liability in respect of the same category of excise duty point in respect of which the primary liability arises..."

The Importation of the Product was not "irregular"

122. There is no definition of "irregular" or of "irregular importation" in the Directive, F(2)A 1992 or the Regulations. The word "irregularity" occurs in Regulations 7, 8, 9, 11, 17, 80, 83 to 85 and is defined for specific purposes in Articles 10 and 38 of the Directive.

123. Neither definition sheds any direct light on the degree of knowledge or dishonesty that is required for there to be an irregular importation under Article 7 2. (d) or Article 8 1. (d) of the Directive or Regulation 12.

124. In DSV's skeleton argument it referred to *HMRC v. Perfect* [2019] EWCA Civ 465, ("*Perfect* 2019") where the Court of Appeal referred to the CJEU the question as to whether a person in possession of excise goods who did not know and had no reason to suspect that the goods had become chargeable to excise duty in the Member State was liable to pay excise duty as a person holding the goods (and whether the answer was different if the person did not know that he was in possession of excise goods). DSV said that pending the decision of the CJEU,

the correct approach is to treat an innocent agent as not holding excise goods. See *Dawson's (Wales) Ltd v Revenue and Customs Commissioners* [2019] UKUT 296 (TCC).

125. At the hearing reference was made to the relevant CJEU decision in Case C-279/19 *The Commissioners for Her Majesty's Revenue and Customs v. WR* EU: C: 221:473 and following that judgement to *The Commissioners for Her Majesties Revenue and Customs v. Martin Glenn Perfect* [2022] EWCA Civ 330. (“*Perfect 2022*”).

126. *Perfect 2022* stated that the CEJU decision had “binding force on and in the United Kingdom as it was a reference from a United Kingdom Court and Tribunal made before the end of 2020.

127. Lord Justice Newey [at 18] stated

“That being so, it seems to me that we are bound by the CJEU’s judgment of 10 June 2021 to hold, as was anyway this Court’s inclination in 2019, that article 33 of the 2008 Directive and, hence, also regulation 13 of the 2010 Regulations:

“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”.

In other words, a person need not be aware that excise duty is being evaded to be “holding” or “making ... delivery of” goods for the purposes of regulation 13 of the 2010 Regulations or article 33 of the 2008 Directive”.

128. DSV say that this case can be distinguished from the circumstances of a lorry driver holding goods on which no duty has been paid and where there is a strict liability. This is not analogous to the circumstances where a professional organisation, engaged in the process of declaring the goods on entry, honestly attempts to declare the correct duty to someone who does not know whether duty is payable or not, as was the case with the lorry driver.

129. DSV made efforts from the outset to declare the correct amount of duty and relied on a system to do so, which initially showed that no duty was payable. This is different from someone who has no right to or interest in the goods and is not aware that they are subject excise duty or if so aware, is not aware they have become chargeable to excise duty.

130. In *Canmi v. HMRC* [2020] UKFTT 16 (TC) the Tribunal refused an application to stay proceedings pending the CJEU decision in the *Perfect 2019*.

131. *Canmi* was an importer of alcohol into the UK and was assessed on a joint and several liability basis on unpaid excise duty in terms of Regulations 6 (1) (d) and 12. Duty arose as a result of the wrong duty code being submitted to HMRC on form C88 to CHIEF.

132. In *Canmi*, the Appellant conceded that the entry of an incorrect code on form C88 when importing beer was irregular for the purposes of Regulation 12, the only issue between the parties being whether the appellant in that case was involved in irregular importation. The Tribunal took the view that the decision in *Perfect 2019* could be relevant to a Regulation 12 case. The Judge said, at [32]

“I am sympathetic with Mr Baig's submissions that Perfect is relevant to the appellant's position. Although Perfect is concerned with "holding" goods, the main point in Perfect is whether Regulation 13 imposes strict liability on someone who is in physical possession of goods at an excise duty point. The issue of strict liability is, to my mind, equally apposite to the concept of "involvement" in Regulation 12”.

133. Canmi referred to two Court of Appeal Criminal Division cases, *R. v. Taylor* [2013] EWCA Crim 1151 and *R. v. Tatham* [2014] EWCA Crim 226.

134. In *Taylor*, the Court of Appeal had to consider Regulation 13(1) of the Tobacco Products Regulations 2001. Regulation 13(1) of those regulations (now repealed and subsumed within the Regulations) said:

“(1) The person liable to pay the duty is the person holding the tobacco products at the excise duty point.”

135. The Court said, as regards that at [31]:

“To seek to impose liability to pay duty on either Heijboer or Yeardeley, who are no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation.”

136. In *Tatham*, the Court of Appeal said at [23]

“(e) A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the ‘holder’ within Regulation 13(1) ...”

137. By analogy with those cases, a person who is unaware that goods are subject to a duty of excise – and in particular one who takes steps to discover whether or not they are dutiable and, as a result of the steps taken, honestly believes them not to be dutiable - is in a similar position. He should not be regarded as having been “involved” in an irregular importation for the purposes of Regulation 12(2).

138. HMRC, via the “Route One” entry clearance requirements, had all of the documentation supporting the entries made by DSV on form C88. Those documents, in several places, described the Product as “Cooking Wine”. DSV took steps to discover whether the Product was subject to excise duty. The evidence of NB shows that DSV made efforts from the outset to ascertain the customs classification and excise duty status of the Product and relied on a customs declaration system produced by a major software provider that appears on HMRC’s list. That system did not show that the Product was subject to excise duty. Nor did HMRC’s online trade tariff service.

139. Given that the information provided both by HMRC’s online trade tariff service and by the software provider did not show that the Product was subject to excise duty, DSV was no more “involved” in an irregular importation than the defendant in *Taylor* was “holding” the tobacco.

140. If HMRC are correct that they can collect tax from a person to whom they serve a notification of joint and several liability without serving a notification, then there is no requirement for them to notify the person they are jointly and severally liable.

141. GWY were holding the goods which were seized but this was later retracted and changed to importation. DSV say there are differences between the details of Assessment 1 and Assessment 2 and there are differences in the methodology.

142. DSV say that the key words are “released for consumption”. You can have more than one excise point usually the earliest but HMRC have chosen a later date. Regulation 6 (1) (b) says that the person holding at the time is responsible and that is GWY. It might not have mattered to MG because GWY was still in the firing line but there is no evidence that DSV had any involvement in holding the goods.

143. DSV cannot be liable under Regulation 10 and there is no cross-reference between Regulation 12 (importation) and Regulation 10 (holding) as if this is an assessment on GWY then DSV cannot be liable. DSV refer to *B&M*, the product retailer who was the holder of the excise goods and where there was an irregular importation but not by them. This was due by someone else who failed to pay the duty, but HMRC found the goods on BLM’s premises.

144. If persons are involved in an irregular importation but not in holding, their involvement in irregular importation cannot link them to a joint and several liability because of holding.

145. DSV say that HMRC require an irregular importation to prove regulation 12 and, therefore, joint and several liability.

146. Advice was not given to GWY and even if it was, no liability attaches to DSV. DSV researched the matter and that is a matter of the contractual arrangements between DSV and GWY. The fact of whether or not there is an indemnity is similarly a commercial consideration for both GWY and DSV and does not link DSV to GWY’s liability.

147. The Regulations were in 2010 and FA 1994 did not deal with how Section 12 FA 1994 operates. DSV say an assessment is needed in terms of both section 12(1) and 12(1)(a) FA 1994.

148. DSV say HMRC guidance is not law and however long-standing nor how many times challenged it may still be wrong. DSV say HMRC did not follow its own guidance in *Canmi* where the importer, the appellant, claimed to be an “innocent agent”.

149. A right to appeal the notification is not in itself relevant but instead it is a procedural requirement that HMRC still needed to raise an assessment under section 12, and this is required for secondary and primary liability.

150. DSV the say that HMRC could have assessed them, and it is not the case that they could only assess under section 12(1).

151. If HMRC are of the opinion that the liability arises then under FA 1994 section 12(1)(a) HMRC can turn it into an assessment.

152. Notification is no effect in law because it is not sufficient to fix liability because an assessment is required.

153. DSV agreed that the notice is not an assessment, but it could be in appropriate circumstances

154. DSV referred to the policy in *B&M* where HMRCs say they assessed at the earliest stage. DSV say that is not what HMRC did with Assessment 1. HMRC only assessed on one date and

the difference between the forms of Assessment 1 and Assessment 2 confirmed this anomaly. Just because HMRC say they assess at the earliest date does not mean they did so assess.

155. DSV say there was no proof that the assessment was correct and was only based on MG's admission.

156. DSV said there is no evidence of irregularities. NB entered the calculation as he thought it ought to be entered and he had advice from the internal officers of DSV.

HMRC submissions

157. In relation to Assessments 1 and 2 there is a clear line of authority, dating from before the relevant imports in this case, explaining that cooking wine, the Product, is chargeable to excise duty (see *Répertoire Culinaire Ltd v HMRC* (Case C-163/09) at [23] and [27]; *HMRC v Asiana* [2014] UKUT 0489 (TCC) at [5], [10] and [22]; and *HMRC v Repertoire Culinaire Limited* [2017] EWCA Civ 1845 at [19]).

158. HMRC say that the first import to which the appeal relates occurred on 17 October 2016, with further relevant imports occurring until 6 June 2018. Excise duty was not paid on the majority of importations and where it was paid, the incorrect amount was paid.

Applicable Legislation Assessments to excise duty

159. The term "made-wine" is defined at s.1(5) of the ALDA 1979: "any liquor which is of a strength exceeding 1.2 per cent and which is obtained from the alcoholic fermentation of any substance or by mixing a liquor so obtained or derived from a liquor so obtained with any other liquor or substance but does not include wine, beer, spirits or cider".

160. It is not in dispute that the Product was chargeable to excise duty and that the correct amount of excise duty was not paid.

161. HMRC's power to raise assessments in respect of excise duty is set out at s.12 FA 1994. For the purposes of this appeal, the applicable time limit for HMRC raising the Assessments is within "the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of HMRC to justify the making of the assessment, comes to their knowledge..."

Liability for assessments to excise duty

162. By Regulation 6(1)(d) of the Regulations excise goods are released for consumption in the UK at the time when the goods are, amongst other things, charged with duty at importation unless they are immediately placed under a duty suspension arrangement.

163. Regulation 12 explains who is liable to pay duty:

(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(d) is the person who declares the excise goods or on whose behalf they are declared upon importation.

(2) In the case of an irregular importation any person involved in the importation is liable to pay the duty.

(3) Where more than one person is involved in the irregular importation, each person is jointly and severally liable to pay the duty.

HMRC's response to DSV's written grounds of appeal

164. DSV's initial Grounds of Appeal raised the following grounds:

Ground 1: "No Valid Assessment and no Joint and Several Liability";

Ground 2: "The Notification Dated 22 September 2020 is not an Assessment";

Ground 3: "The Notification Dated 22 September 2020 is out of Time in any Event";

Ground 4: "The importation of the Product was not "Irregular";

Grounds 2 and 3: the nature of the notification dated 22 September 2020

165. Grounds 2 and 3 misconstrue the nature of HMRC's decisions that are under challenge.

166. HMRC's email dated 22 September 2020, attaching the letter dated 17 September 2020, was not an assessment to excise duty. Instead, it was a notification to DSV that HMRC considered DSV to be joint and severally liable in respect of the Assessments. To that end, HMRC agree with DSV in respect of Ground 2: the notification on 22 September 2020 was not an assessment.

167. HMRC's position in this regard is consistent with their published guidance (underlining added):

"EAIG21100:

Notifying joint and several liability: establishing the debt to excise duty

Making and notifying an assessment to a person with primary liability to pay excise duty establishes their liability for the debt. Once that liability is established, if the amount is not paid, it may be recovered from those persons who have a secondary, joint and several liability to pay.

Such persons should not be assessed. Instead, they should be notified of their joint and several liability by letter, normally at the same time as the assessment is notified to the person with primary liability.

EAIG3500:

Liability including joint and several liability: secondary (joint and several) liability

The following is a definition of joint and several liability provided by HMRC's Solicitor's Office:

"Where liability is several, it is possible to proceed against each person individually and recover from each person individually.

"Where there is a joint liability, proceedings must be taken against persons jointly, but each person is jointly liable for any debt such that where one person has no funds the whole of the amount of any debt can be recovered from the other person or persons who are jointly liable."

What this means, if a number of persons are jointly and severally liable, is that we can take civil recovery action against them all at the same time, or one at a time.

In excise legislation, it is often the case that one person is defined as having a primary liability to pay, and other persons are identified as having a secondary, joint and several liability.

Those with a secondary liability will be liable to pay with the first named person. It is therefore clear that, although their liability is “several” as well as joint, that liability is dependent on the first named person being liable.

In such cases, it is necessary to assess the person with primary liability in order to establish the connection between that person and the person(s) with secondary liability. Without a legally valid assessment to primary liability there is no legally enforceable debt in respect of secondary -joint and several- liability.

The person(s) with secondary liability should not be assessed. Instead, they should be notified of their liability to pay by letter, see EAIG21000.”

168. It follows that Ground 3 does not arise, at least as far as it refers to s.12(4) of the FA 1994. This is because Ground 3 is premised on the basis that an assessment was raised on 22 September 2020. That is not correct – there was no assessment on that date.

169. However, DSV appears also to advance an argument under Ground 3 that HMRC’s “delay in notifying DSV of such liability was of sufficient length to render the assessments raised against GWY and the Notification nullities as regards DSV”. This is incorrect:

- a. DSV does not identify any legal basis by which the Assessments could be rendered “nullities”.
- b. There was no unreasonable delay in the notification of the Assessments. Assessment 1 was notified to DSV just over 10 months after the assessment was raised (10 months and 3 days). Assessment 2 was notified to DSV less than 3 months after the assessment was raised (2 months and 23 days). Those timings were not unreasonable.
- c. The written notifications of joint and several liability did not come as a surprise to DSV. Just 14 days before receipt of the notification, DSV asked HMRC if it was “being investigated jointly and severally as liable ...” NB says that this was because HMRC had indicated by telephone on 28 August 2020 that DSV was liable on a joint and several basis. On 9 September 202, DSV said that it wanted to know if any such investigation was under way to understand if it was “a risk to the business etc.”. HMRC informed DSV of the notification promptly after this email.
- d. The absence of a statutory time limit for a notification is consistent with HMRC’ published guidance at EAIG21300:

Notifying joint and several liability, are there time limits

There are no time limits for notifying joint and several liability. However, as a matter of policy we would *expect* such notification to be sent within a reasonable time and when possible at the same time as the assessment itself.

This may not always be possible, for example when a person’s liability for the duty, or their address, is identified at a later date. In these circumstances notification within a reasonable time is acceptable.

Ground 1: the validity of the Assessments

170. By Ground 1, DSV argues that the Assessments were not valid, at least in relation to DSV, and DSV's "purported joint and several liability is accordingly of no effect".

171. DSV contends that the Assessments were not "valid as regards DSV" but if that is seeking to suggest that HMRC should have assessed DSV then the argument is misconceived. It is no part of HMRC's case that DSV was assessed (or that they needed to be). Instead, the Assessments were issued to GWY because GWY (as the importer) had primary responsibility to pay the outstanding excise duty.

172. By law, DSV is jointly and severally liable for unpaid excise duty in relation to the imports. Nothing in law requires HMRC to raise an assessment addressed to DSV. It assessed the unpaid excise duty in an assessment addressed to GWY.

173. In response to DSV's submission that s.1(4) of F(2)A 1992 does not permit HMRC to make regulations that alter the assessment/notification procedure in FA 1994, HMRC say that F(2)A 1992 predates FA 1994 and does not contend that the Regulations amend the assessment/notification procedure in FA 1994 and in any event that procedure doesn't apply in relation to DSV's joint and several liability.

174. The Regulations were made under s.1 of F(2)A 1992 which empowered HMRC to fix duty points at s.1(1), specify the person or persons on whom the liability to pay duty falls at s.1(2)(a) and specify whether liability is joint and several at s.1(2)(b).

175. Regulation 6 defines a duty-point arising when goods are released for consumption in the UK as occurring: (i) when the goods are held outside a duty suspension arrangement and excise duty is unpaid ("holding", regulation 6(1)(b)); and (ii) at importation unless the goods are immediately placed under duty suspension ("importing", regulation 6(1)(d)).

176. In relation to holding: (i) the "holder" of the goods is liable (regulation 10(1)); and (ii) another person can be jointly and severally liable "to pay the duty with the person specified in paragraph (1)". Accordingly:

- a. A person liable under regulation 10(2) is liable alongside a person under 10(1) ("with").
- b. If there is no one liable under 10(1), there can be no one liable under regulation 10(2).
- c. The liability under regulation 10(2) is akin to secondary liability.

This is the analysis that is reflected in HMRC Guidance.

177. In relation to importing:

- (i) liability is the declarant or the person on whose behalf a declaration was made (regulation 12(1));
- (ii) others can also be liable if there is an "irregular" import (regulation 12(2));
- (iii) where more than one is liable, the liability is parasitic (regulation 12(3)).

There is nothing to provide the basis for a requirement that assessments be addressed to DSV. The amount of the unpaid excise duty was identified within assessments addressed to GWY. This too is akin to primary and secondary liability.

178. In any event, the Assessments were clearly valid because they related to unpaid excise duty and, in this appeal, it is not disputed that GWY paid the incorrect amount of excise duty.

In addition, the Assessments were raised within the applicable statutory time-limit of one year: HMRC did not receive purchase invoices in relation to all the relevant imports until early July 2019.

179. DSV can appeal to the FTT from a notification informing it that it is being held jointly and severally liable. On appeal to the FTT, DSV can argue, amongst other things, that: (i) an error has been made in assessing the amount of excise duty due; (ii) DSV is not liable for the duty contained within the assessments (for example because the import is not “irregular”).

Ground 4: the validity of the Assessments

180. By Ground 4, DSV argues that there was no “irregular importation” of the Product because the failure to account for the correct amount of excise duty did not involve dishonesty. This is incorrect:

a. First, there is no requirement that an “irregular importation” involves dishonesty, and DSV has not identified the legal basis for any such requirement. If Parliament had intended such a requirement, then it would have said as much in its legislation.

b. Second, the importations were “irregular” because GWY purported to release the Product into free circulation in the UK, and for consumption in the UK (following its importation from China) without the necessary formalities having been complied with to release those goods for consumption; incorrect information had been provided on the import declarations because excise duty was not declared and was unaccounted for.

c. Third, HMRC’s approach to the meaning of the phrase “irregular importation” is consistent with the approach referred to in *Canmi Limited v Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 0016 (TC) where the parties agreed that the use of an incorrect tax code comprised an irregularity:

“11. The parties are agreed that in order for the appellant to be jointly and severally liable for the underpaid duty, there must be both an irregular importation, and *Canmi* must have been involved in that irregular importation.

12. It is my understanding that the parties are also agreed that the use of the incorrect tax code (over which I understand there to be no dispute) comprises such an irregularity. And so the only issue in this case is whether *Canmi* was involved in that irregular importation.”

d. Fourth, there can be no question that DSV was involved in the importations given its role as import agent:

i. DSV raised queries as early as 2016 in relation to the excise duty chargeable on the Product.

ii. In 2018, DSV and GWY exchanged emails regarding the excise duty chargeable on the Product

iii. GWY explained that it relied upon DSV’s advice in relation to excise duty

iv. DSV took responsibility for GWY seeking to reclaim excise duty

e. Fifth, DSV’s contractual arrangements with GWY (including the Customs Instruction) sought to protect itself from secondary liability for, amongst other things, excise duty.

181. DSV say that Regulation 12(2) deals with persons whose actions are not covered by Regulation 12(1) but who had some other involvement in an irregular importation. HMRC say that there is no reason a person's actions might not make them liable under both Regulation 12(1) and Regulation 12(2).

182. HMRC say that it makes no sense to require an assessment of unpaid excise duty in a document addressed to DSV when there has already been an assessment of the same duty in a document addressed to GWY. DSV does not need to be assessed to "fix liability". Regulation 12(3) provides that DSV is jointly liable and that effectively 'fixes' DSV's liability.

183. An assessment is not "needed" so that DSV has a right of appeal to the FTT, because it is common ground that DSV can bring an appeal. There is, however, a need to establish the amount of excise duty that is unpaid and that was done in the assessment that was addressed to GWY.

184. S.12(1A) of the FA1994 provides that HMRC may assess the amount of duty due from a person and notify them. It does not say that HMRC must assess (and HMRC did not need to assess DSV because Regulation 12(3) already provides that DSV is jointly and severally liable in respect of the unpaid excise duty).

185. S.12(3) of the FA 1994 deals with the situation where the same person is assessed and notified which does not apply. That does not apply here and legal principles about deeming provisions therefore do not apply.

186. HMRC say the case of *Canmi* should be considered with a degree of caution as the Judge was dealing with an application for a stay [at 3 and 4] and not about an alleged "need" for an assessment. The precise mechanism by which the taxpayer was being held liable is not described in detail. HMRC followed the same procedure in *Canmi* as it has here by assessing 'primary' liability and notifying 'secondary' liability.

187. The Regulations are not purporting to amend primary legislation and the Regulations are made under the F(2)A 1992 which predates the FA 1994.

188. HMRC cannot collect tax without serving a notification. Commencing recovery proceedings through a civil claim requires notification. In any event, if HMRC failed to follow its policy in relation to notifications then this might provide a ground for a public law challenge.

189. DSV argues that assessments were properly raised in respect of GWY but those assessments do not impact DSV. If that is correct, the notification letter sent to DSV can have no legal effect and it is unclear what the purpose of an FTT appeal would be. DSV's argument would be more suited to defend an attempt by HMRC to enforce, through a civil claim, a joint and several notification.

190. DSV argues that, in relation to the goods seized from GWY's premises, the duty point arises as a result of being held outside duty suspension. This is misconceived because it is:

- a. Wrong in law: B&M [at 69,72,137,150, and 155]: "... in circumstances where [HMRC] is unable to assess any person who caused a prior release for consumption to occur, it is open to the member state to assess ... any person who is found to be holding" HMRC were not unable to assess in respect of an earlier duty-point because they knew that GWY had imported the goods; and

b. Wrong in fact: Contemporaneous evidence is clear that the assessments were in respect of importation. MG's evidence is not fatal to HMRC's case and supports it. In his evidence, MG explained that the assessment was raised in respect of an importation duty-point.

191. The importations were "irregular" because excise duty that was payable on the goods was not paid and therefore the goods were declared for release without the collection of excise duty that was due, see *Canmi* [at 12].

192. HMRC say for an importation to be "irregular" it does not require a "degree of knowledge or dishonesty, the question is whether an importation was "irregular" is in accordance with the natural meaning of that word.

193. HMRC say that *Perfect 2022* is against DSV ([30]-[36])

194. HMRC say that it is wrong in law that by "analogy ... a person who is unaware that goods are subject to a duty of excise ... is in a similar position to one who attempted to declare duty".

195. On the evidence NB's instinct from the outset was that excise duty was due but it was not paid or not paid correctly. Notice 41 indicated that excise duty was payable and contemporaneous evidence indicates an understanding within DSV that excise duty was payable.

196. When DSV finally sought to declare excise duty on CHIEF, it used a formula to calculate the litres of chargeable product that made no sense, particularly given that the law provides that the rate of excise duty varies depending on the strength of wine.

197. Regulation 10(1) says the person liable to pay the duty is the person holding the goods-they have a primary liability. Regulation 10(2) refers to any other person holding with the person in Regulation 10(1) and accordingly, they have a secondary liability. If no one is liable under 10(1) then there cannot be anyone liable under Regulation 10(2).

198. EAIG3500 means that it is necessary to establish who has the primary liability. You cannot hold a second person liable unless there has been an assessment of the primary liability and the secondary liability should not be assessed they should be notified in writing.

199. There is nothing in the legislation saying it is necessary to raise an assessment. Regulation 12 says who is liable to pay. As with Regulation 10, this creates a primary and secondary liability.

200. DSV can appeal a notification to an appeal as they done so here so no assessment is needed for an appeal.

201. HMRC say the regulations themselves fix the liability.

202. F(2)A 1992 does not dispense with the need to assess. HMRC say there is no need to assess DSV in law. FA 1994 says HMRC may assess the amount of duty and does not say it must. HMRC did not need to assess.

203. Regulation 12(3) is a defining provision and has no relevance to this appeal because it relates to those assessed and notified. HMRC are not relying on Regulation 12(3).

204. In relation to *Canmi*, HMRC say that the Tribunal should exercise caution as this was a procedural case pending a CEJU decision. Paragraph 3 refers to an 'innocent agent' and this

was not a substantive appeal but instead about a stay of proceedings. HMRC say the focus is on the stay application and not on the issue and there was no factual analysis of who was assessed or notified [at 2].

205. HMRC say that if they did not send a notification there could be no joint and several liability. The Tribunal should see the arguments in the round. There may be other cases where a notification letter is issued when the law requires an assessment but that is not the case here.

206. In relation to the holding of goods, DSV say that duty is not payable as it relates importation and because it is out of suspension. In *B&M*, the goods were at the warehouse and there were missing traders. The owner was assessed as the holder although there was an earlier duty point and the goods could be released again and there was no second duty point.

207. Assessment 1 used the earliest date which was the importation date. This was the earliest point in time. There is to a nothing to say that HMRC can assess only on an early duty point - they can also set at a later date. When MG arrived to see the goods, he knew the duty point had arisen on importation so that he had to use that to assess the goods. HMRC say that the evidence is clear that the assessment was in respect of an importation

208. HMRC say the mistakes and procedural errors resulted in duty not being payable and this comprised an irregularity which is backed up by *Canmi* [at12] leaving the only issue whether *Canmi* was involved in that irregular importation.

209. HMRC that say there is a strict liability as shown by an analysis of the *Perfect 2022* and *Taylor* cases. It does not matter if there is awareness of a liability to duty or not. DSV accept that *Perfect 2022* is against them.

TRIBUNAL DECISION

210. Both NB and MG were credible witnesses. It was clear that NB had detailed technical knowledge and had sought at all times to act appropriately to declare the correct amount of duty.

211. DSV and any import agent would logically rely on the importer, in this case GWY, to provide details of the goods they were importing, in this case, the Product, as the importer would have a detailed knowledge necessary and details of the intended use of the goods.

212. NB placed considerable reliance on the CHIEF system and HMRC's official tariff system, but he and his colleagues made several errors so that excise duty on the Product was either not paid or paid incorrectly. NB's instinct, however, was that duty was payable on rice wine.

213. HMRC clearly leave the responsibility for ascertaining the commodity code and payment of excise duty on the importer. The Tribunal considered that DSV acted simply as agents for GWY and accepted NB's position that neither he nor DSV provided advice to their customers, including GWY.

214. The Tribunal did not consider it relevant to the liability for excise duty in terms of the law that DSV sought an indemnity agreement from customers in relation to outstanding amount of excise duty.

Product subject to Duty

215. The Tribunal accepted HMRC's submissions that duty was payable on the Product, namely "made wine" being Chinese rice cooking wine call Shaoxing in terms of ALDA 1979.

Valid assessments against GWY

216. The Directive sets out the general arrangements for excise duty which seek to harmonise the principles to be applied across the EU member states as regards the point at which excise duty should be levied on excise goods. The Directive 2008 repealed the Directive of 1992 which formerly governed these matters.

217. Article 7 makes provision for the time and place of chargeability of excise duty and provides that excise duty becomes chargeable on the "release for consumption" in the Member State in which they are so released.

218. Article 8 describes who shall be liable to pay excise duty that has become chargeable, the identity of that person depending on the event which causes the release for consumption.

219. F(2)A 1992 contains the necessary authority or the making of regulations to implement the provisions of the Directive concerning the chargeability of goods to excise duty in the UK and the persons liable to pay such duty.

220. Regulations 6(1) and 7(1) set out when goods are released for consumption and when excise goods leave a duty suspension arrangement. Regulations 8 to 12 describe those who are liable to pay duty when excise goods are released for consumption in accordance with Regulation 6.

221. Regulation 6 (1)(d) states that excise goods are released for consumption at the time when the goods are charged with duty at importation unless they are placed, immediately upon importation of duty suspension arrangements.

222. None of the Product imported by GWY was placed under excise duty suspension arrangement and the correct amount of excise duty was not paid.

223. Assessment 1 relating to 71,060 litres of Product seized at GWY's premises and imported all their behalf by their import agents DSV.

224. In respect of the period default dates contained within Assessment 1 and the accompanying letter of 21 November 2019 the Tribunal preferred the submissions made by HMRC to those made by DSV that the duty point was correct under Regulation 6(1)(d) (importation). HMRC knew the duty point had arisen on importation and this was made clear in MG's evidence.

225. Accordingly, the Tribunal considered that Assessment 1 was based on the importation of the goods and not the "holding" of goods under Regulation 6(1)(b).

226. Similarly, the Tribunal considered that Assessment to which was calculated in respect of imports of the Product by DSV on behalf of GWY between 17 October 2016 and 6 June 2018 was valid.

227. It was common ground between the parties that the assessments were within the time limits set out in FA 1994 and that no assessments were raised against DSV

Valid notification against DSV and whether joint and several liability

228. DSV's submission is that there were no valid assessments against DSV, but only to GWY, and accordingly there can be no liability to duty on the part of DSV.

229. The power to assess is given at section 12(1) FA 1994 and section 1(2) F(2)A 1992 enables HMRC to make regulations to fix excise duty points, to specify the person or persons on whom the liability to pay duty is to fall at the excise duty point and to specify whether a liability is joint and several.

230. Regulation 12(1) says the person liable to pay duty when excise goods are released for consumption by virtue of Regulation 6(1)(d) is the person who declares the excise goods or on whose behalf they are declared on importation.

231. Regulation 12 (2) states that in the case of an irregular importation any person involved in the importation is liable to pay the duty and Regulation 12(3) states that where more than one person is involved in the irregular importation, each person is jointly and severally liable to pay the duty.

232. DSV say that F(2)A 1992 does not permit HMRC to make regulations that alter the assessment of notification procedure in FA 1994.

233. The Tribunal does not consider that the regulations alter the assessment notification procedure in FA 1994 nor that the power to make delegated legislation is being used to amend primary legislation, without clear authority, for the reasons put forward by HMRC. The assessment/notification procedure in FA 1994 do not apply in relation to DSV's joint and several liability.

234. Legally valid assessments were made on GWY who had the primary liability which fixed the amount of excise duty that was payable. These established DSV's secondary liability.

235. GWY were clearly the importer and if DSV's contention is correct and that an assessment should also be made on the import agent, notwithstanding that the primary liability is with the importer, it would create an impossible burden on HMRC.

236. It was unclear to the Tribunal how this would work in practice if, for instance, one party decided to challenge the assessment and the other did not and on what basis the import agent would challenge the assessment given the limited role in ensuring that the appropriate declaration is made and duty paid based on information from the importer.

237. DSV say that looking at the structure of the Directive and Regulation 12 it would have been open to HMRC to assess both DSV and GWY under regulation 12(1).

238. The Tribunal could see nothing in the legislation that requires HMRC to raise an assessment addressed to DSV in relation to its secondary joint and several liability.

239. HMRC assessed and fixed the amount of the unpaid excise duty in an assessment addressed to GWY who HMRC considered to have been primary liability. DSV have a secondary liability. There was no assessment on DSV and the Tribunal accepted HMRC's contentions that there was no need for them to do so.

240. In relation to the holding goods, a secondary liability arises when goods are held outside a duty suspension arrangement and excise duty is unpaid ("holding") under Regulation 6 (1)(b). Under Regulation 10 the holder of the goods is liable and another person can be jointly and severally liable to pay the duty which is akin to a secondary liability.

241. In relation to importing goods, under Regulation 6(1)(d), when goods are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement, Regulation 12 provides that the declarant or the person on whose behalf the declaration was made is liable but others can be liable if there is an irregular import and where more than one person is involved in irregular importation each is liable.

Holding or importation

242. The issue of whether an assessment related to a duty point arising from holding goods outside of duty suspension, rather than from the earlier import of goods, arises only in respect of Assessment 1.

243. This ground of appeal arose during the hearing and was based on the evidence of MG and consideration of Assessment 1 and the duty point based on the dates used in the assessment. The accompanying letter dated 21 November stated that the assessment referred to “excise duty on excise goods (alcohol) released for consumption in the United Kingdom”.

244. The letter referred to Regulation 6(1)(d) where “excise goods are released for consumption in the United Kingdom at the time when the goods are charged with duty at importation unless they are placed, immediately upon importation under a duty suspension arrangement”.

245. It continued “As the goods held by you were not placed immediately under excise duty suspension arrangement after customs duty was paid and the correct amount of excise duty was not immediately paid regulation 88 made those goods liable to forfeiture”.

246. The letter then referred to regulation 12(1) stating that the person liable to pay the duty when excise goods are released for consumption by virtue of Regulation 6(1)(d) is the person who declares the excise goods or on whose behalf they are declared upon importation. As you were the person on behalf of the goods were declared on importation, you are therefore liable to pay the UK excise duty”.

247. The Tribunal considered that the goods were not assessed under Regulations 6 (1)(b) and 10 when they were confiscated. They had been assessed under Regulations 6(1)(d) and 12 as being imported and there was no ‘holding’ of the goods.

Whether the import was ‘irregular’

248. The Tribunal accepted HMRC’s submission that section 12(1A) of F A 1994 provides that HMRC may assess the amount of duty due from a person and notify them but it does not say that they must assess.

249. HMRC, say they did not need to assess DSV because Regulation 12(3) provides that DSV is jointly and severally liable in respect of the unpaid excise duty.

250. The Tribunal held that there was an irregular importation because GWY purported to release the product into free circulation in the UK, and the consumption in the UK, without the necessary formalities having been complied with to release those goods for consumption.

251. The reason the necessary formalities had not been complied with resulted on the incorrect information received by and the difficulties encountered by DSV on the import declarations and the use of CHIEF.

252. The excise duty was not declared correctly and was unaccounted for. In *Canmi*, the taxpayer and HMRC agreed that “the use of an incorrect tax code comprises such an irregularity”.

253. DSV say that Regulation 12(2) deals with persons whose actions are not covered by Regulation 12(1) but who had some other involvement in an irregular importation. Accordingly, a person can be liable to excise duty under Regulation 12 (2) and not be liable under Regulation 12(1) and it is also possible for more than one person to be liable under Regulation 12 (2) with none of those persons being liable under Regulation 12(1).

254. Regulation 12(3) builds on Regulation 12 (2) by making it clear that each person involved in an irregular importation is jointly and severally liable to pay the duty.

255. DSV state that to be ‘involved’, requires a degree of knowledge or dishonesty. By contrast a person who take steps to discover whether or not goods are dutiable and, as a result of the steps taken, honestly believes them not to be dutiable should not be regarded as having been “involved” in an irregular importation for the purposes of Regulation 12 (2).

256. In *Perfect 2022*, Mr Perfect had no interest of his own in the imported goods, was not part of any conspiracy and had simply followed instructions, the Court imposed a strict liability in relation to Regulation 13. This stated that the individual’s innocence did not matter and that the liability to excise duty was a strict liability.

257. The Tribunal considered that a degree of knowledge or dishonesty was not required in order to be ‘involved’ and the DSV were involved.

258. The Tribunal consider that the same strict liability set out in *Perfect 2022* applies to Regulation 12 and agrees with *Canmi* [at 32] that the strict liability in relation to Regulation 13 is equally apposite to ‘involvement’ in Regulation 12.

259. In any event DSV were not “unaware that the goods were subject to a duty of excise” as NB’s instinct from the outset was that excise duty was payable and the various attempts were made to declare it which were ultimately to confirm that instinct.

260. The Tribunal considered that on the facts before it the importation was “irregular” and that DSV was involved in that irregular importation.

261. Accordingly, the Tribunal considered that DSV were joint and severally liable for the assessments against GWY in terms of the Regulations.

262. For the reasons stated, the appeal is dismissed.

Right to apply for permission to appeal

263. 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.

TRIBUNAL JUDGE Ruthven Gemmell WS

Release date: 14th February 2023