



Neutral Citation: [2024] UKFTT 00431 (TC)

Case Number: TC09177

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

In Taylor House London

Appeal reference: TC/2022/01232
TC/2023/12842

EXCISE DUTY—Appeal against notice of joint and several liability to pay assessment to excise duty—Duty unpaid cigarettes found in a storage space rented out by Appellant to a third party—Whether Appellant was “involved in the holding of the excise goods”—Excise Goods (Holding, Movement and Duty Point) Regulations 2010, reg 10(2)—Appeal against associated penalty—Whether Appellant was “concerned in ... keeping or otherwise dealing with the goods”—FA 2008, Sch 41, para 4(1)

Heard on: 16-17 January 2024

Judgment date: 23 May 2024

Before

**TRIBUNAL JUDGE CHRISTOPHER STAKER
MOHAMMED FAROOQ**

Between

GILES BUNTING

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ross Birbeck of counsel, instructed by Tees Law

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

DECISION

1. The appeals are allowed.
2. The notification dated 10 September 2021, upheld in the review conclusion letter dated 21 January 2022, that the Appellant is jointly and severally liable to pay the assessment to excise duty issued on 10 September 2021 in the amount of £808,842, is quashed.
3. The excise wrongdoing penalty dated 18 May 2022 in the sum of £161,768, upheld in the review conclusion letter dated 1 September 2022, is cancelled.

REASONS

SUMMARY

4. The Appellant, who is the owner of a farm, rents out storage units in a barn situated on the farm. HMRC officers made an unannounced visit the farm, and found duty-unpaid cigarettes in one of the storage units being used by a third party. The person who was using the storage unit at the time was assessed to excise duty on the cigarettes, and the Appellant was issued with a notice of joint and several liability to pay the assessment, on the basis that he was “involved in the holding of” the cigarettes within the meaning of regulation 10(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“HMDPR”). The Appellant was also issued with an associated penalty under paragraph 4(1) of Schedule 41 to the Finance Act 2008 (“FA 2008”) for being “concerned in ... keeping ... the goods”. The Appellant appeals both against the notice of joint and several liability to pay the assessment, and against the penalty.

5. In this decision, the Tribunal allows both appeals, finding as follows. A property owner who enters into an agreement allowing a third party to have use of part of the property for the storage of goods does not, for that reason alone, become “involved in the holding of” any and all goods that the third party may subsequently happen to store on the property, within the meaning of regulation 10(2) HMDPR. Nor in that situation does the property owner for that reason alone become “concerned in ... keeping or otherwise dealing with” any and all goods that the third party may subsequently happen to store on the property, within the meaning of paragraph 4(1) Schedule 41 FA 2008. In the absence of any other relevant circumstances, the owner of the property will in this situation only be “involved in the holding of”, and “concerned in ... keeping or otherwise dealing with”, excise goods held by a third party on the property if the owner knows or should know that excise goods are being held on the property. In the present case, the Appellant did not know and should not have known that, and there are no other relevant circumstances that could result in the application of these provisions to the Appellant.

FACTS

6. The Appellant is the owner of a farm. As part of his business, he rents out several storage units in buildings on the farm.

7. In 2018, the Appellant engaged Mr Bartlett, a freelance business consultant and property manager, to assist him in finding a tenant for one of the units (“**Unit 1**”). A person referred to in this decision as “**AB**”, trading by a name referred to in this decision as “**AB Trading**”, was identified as a suitable tenant. AB was required to produce a utility bill, bank statement and driving licence as proof of his identity. Mr Bartlett prepared a written commercial lease agreement, by which the unit was leased by Don Bunting Farms (the name by which the Appellant traded) to AB Trading for two years, from 21 June 2018 to 21 June 2020, for £1,250 per month.

8. The written lease agreement provided that the “Property” that was the subject of the lease was Unit 1. It stated that the permitted use of the unit was “Storage”. It included covenants of AB as tenant not to do anything which might invalidate any insurance policy covering the property or which might increase the premium, and not to allow the property to be used for any illegal or immoral purposes. It also included a covenant of AB “[n]ot to assign ... transfer, underlet, share the whole or any part of the Property or share occupation of the Property”. It furthermore required AB to leave a spare key for the unit with the Appellant, and to allow the Appellant and all persons authorised by the Appellant to enter the unit at any time for any purpose.

9. The Appellant states as follows.

- (1) Approximately 18 months after the lease commenced, AB permitted another person, referred to in this decision as “CD”, to have joint use of the unit. Initially, AB continued to pay the rent as normal, and the Appellant assumed that CD paid AB something for his joint use of the unit. The Appellant agreed to this, and considered this to be a sub-letting of part of the unit by AB to CD. Some 1 to 3 months after CD began jointly using the unit, AB vacated the unit. CD stayed on as its sole user, and began paying the Appellant directly £1,000 per month in cash. The Appellant agreed to this, and considered this to be an oral assignment of the lease by AB to CD, with a reduced rent.
- (2) The Appellant did not use the services of Mr Bartlett in relation to the lease of the unit to CD. No written agreement was ever entered into between the Appellant and CD, and CD was not asked to provide proof of his identity. At all material times, the Appellant knew CD only by his given name, and did not know his surname. The only contact details that the Appellant had for CD was a mobile phone number.
- (3) The Appellant understood AB and CD to both be market traders who used the unit to store market trading goods. The Appellant personally saw clothing and other market trading items in the unit, and being loaded into and out of the unit. He had no reason to believe that anything untoward was happening in relation to the unit.
- (4) At all times, the Appellant had a key to the unit. The unit contained a power board, and the Appellant had to enter it to read electrical metres and to trip switches if there was a power problem. He would also have been entitled to enter for any other purpose.

10. On 16 September 2020, HMRC officers made an unannounced visit to the farm. They telephoned the Appellant, who immediately drove to the farm and gave the HMRC officers access to the storage units. Inside Unit 1, the HMRC officers found 2,537,600 cigarettes, which they seized. The Appellant stated to the HMRC officers that he rented the unit out, and informed them of CD’s given name and mobile phone number. The HMRC visit concluded the following morning, and HMRC left a seizure information notice dated 17 September 2020 with the Appellant, which the Appellant signed. On 28 October 2020, the Appellant provided a witness statement to HMRC.

11. On 10 September 2021, HMRC issued to CD, pursuant to regulation 10(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“HMDPR”), an excise duty assessment in respect of the cigarettes, on the basis that CD was “the person holding the excise goods”. On the same date, HMRC issued to the Appellant, pursuant to regulation 10(2) HMDPR, a decision that he is jointly and severally liable to pay that excise

duty assessment, on the basis that he was an “other person involved in the holding of the excise goods”.

12. CD later informed HMRC in writing that he did not agree with the assessment and did not accept liability, but no appeal was lodged by him.

13. On 21 January 2022, HMRC issued a review conclusion letter in which they upheld the 10 September 2021 decision that the Appellant is jointly and severally liable to pay the excise duty assessment. On 16 February 2022, the Appellant appealed to the Tribunal against that decision.

14. On 13 April 2022, HMRC sent to the Appellant an explanation of a penalty that it intended to issue to him under Schedule 41 to the Finance Act 2008 (“FA 2008”). The penalty explanation stated that the Appellant’s excise wrongdoing consisted of the fact that the cigarettes were on his property at the time that they were seized, and that there was no evidence that UK duty had been accounted for on them. The penalty explanation stated that the penalty was calculated on the basis that the Appellant’s behaviour was “non-deliberate”, since “Although you [the Appellant] failed to carry out the necessary due diligence on the new tenant, you were unaware that the unit was being used to store illicit cigarettes”. It furthermore stated that the Appellant was considered to have made a prompted disclosure, and that the Appellant was to be given the maximum reduction for the “quality of the disclosure” (or “telling, helping and giving”). On 18 May 2022, HMRC issued the notice of penalty assessment to the Appellant.

15. On 1 September 2022, HMRC issued a review conclusion decision, upholding the penalty decision. The review conclusion letter indicated that the penalty was imposed under paragraph 4(1) Schedule 41 FA 2008, on the basis that the Appellant was “keeping” the cigarettes within the meaning of that provision. This was said to be because the cigarettes were stored in his unit, and because he was allowed to enter the unit at any time for any purpose and had a key to the unit. That review conclusion letter further stated that “I agree that there is insufficient evidence to show that you knew what you were doing was wrong (keeping illicit cigarettes) but continued to do it anyway”, and that the finding of “non-deliberate” behaviour was therefore correct. On 4 October 2022, the Appellant appealed to the Tribunal against the penalty decision.

16. On 3 January 2023, the Tribunal directed that the two appeals be heard together.

17. At the hearing of this appeal on 16 and 17 January 2024, oral evidence was given by:

- (1) Mr Bartlett;
- (2) the Appellant; and
- (3) Daniel Clough, HMRC officer in the Excise Team.

The Tribunal also had before it a further witness statement given to HMRC by an employee of an agricultural consultancy firm of which the Appellant was a client.

LEGISLATION

18. Regulation 5 HMDPR relevantly provides that “there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom”.

19. Regulation 6(1)(b) HMDPR provides that “[e]xcise goods are released for consumption in the United Kingdom at the time when the goods ... are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement”.

20. Regulation 10 HMDPR provides:

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

21. Section 12(1A) of the Finance Act 1994 (“**FA 1994**”) empowers HMRC to issue an assessment to a person from whom any amount has become due in respect of any duty of excise.

22. Sections 7, 13A(2)(b), 16(1B) and 17(2) FA 1994 provide for an appeal to this Tribunal against a decision of HMRC to issue an assessment to excise duty under s 12(1A) of that Act.

23. Section 16(5) FA 1994 provides that the power of the Tribunal in such an appeal includes the power to quash or vary any decision and the power to substitute its own decision for any decision quashed on appeal.

24. Section 16(6) FA 1994 provides that subject to certain exceptions that are not relevant in these proceedings, in such an appeal to the Tribunal against an assessment, it is for the Appellant to show that the grounds on which any such appeal is brought have been established.

25. Paragraph 4(1) of Schedule 41 to the Finance Act 2008 (“**FA 2008**”) provides:

A penalty is payable by a person (P) where—

- (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
- (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.

26. Paragraph 17 of Schedule 41 FA 2008 provides that “P may appeal against a decision of HMRC that a penalty is payable by P” and that “P may appeal against a decision of HMRC as to the amount of a penalty payable by P”.

27. Paragraph 18(1) of Schedule 41 FA 2008 provides that such an appeal shall be treated in the same way as an appeal against an assessment to the tax concerned.

ARGUMENTS OF THE PARTIES

28. The Appellant submits that the appeals against both decisions should be allowed, and that the decisions under appeal should be set aside.

- (1) In relation to the appeal against the notification that the Appellant is jointly and severally liable to pay the assessment to excise duty issued to CD (the “**main appeal**”) the Appellant argues the following.
 - (a) The Appellant was not “holding” the cigarettes within the meaning of regulation 10(1) HMDPR, nor was he “involved with the holding of the excise goods” within the meaning of regulation 10(2) HMDPR.
 - (b) The Appellant and AB Trading had verbally agreed that AB Trading could assign the written lease to CD, and from November 2019 CD took over the lease and paid the rent. That lease was never terminated in accordance with

s 25 of the Landlord and Tenant Act 1954, such that it was still effective on 16 September 2020, the date of the HMRC visit. Alternatively, the original written lease was novated to CD, or AB sub-leased the unit to CD on the basis that CD would pay an (albeit reduced) rent directly to the Appellant.

- (c) It is not unusual in the case of the rental of a low value storage unit in a farmyard for dealings to be very informal. A written lease can be varied orally. The clause in the lease agreement prohibiting AB from sub-letting the unit or assigning the lease only prevented AB from doing so without the consent of the Appellant.
 - (d) The Appellant was thus CD's landlord, and CD was his tenant. All that the Appellant was permitted to do was to terminate the lease and enter the property and evict CD if he was in breach of his covenant in the lease not to use the unit for illegal or immoral purposes. The Appellant had no actual *de facto* control over the goods in the unit, and no legal control of them via the lease.
 - (e) The fact that the Appellant had at all times a key to the unit and the right to enter was not inconsistent with the arrangement being a lease. Merely entering the unit did not make the Appellant involved with the items stored in the unit.
 - (f) The Appellant had no actual or constructive knowledge of the existence of duty-unpaid cigarettes. There was nothing unreasonable about the Appellant's actions: he left his tenant to enjoy the property until there was an indication that the tenant was not behaving as the terms of the lease required.
 - (g) The Appellant had no duty to monitor the contents of the unit nor the activity of CD, even if he had a right (purely for his own benefit) to inspect the unit. Neither common law nor equity nor regulation 10(2) HMDPR imposes such a duty.
- (2) In relation to the appeal against the penalty, the Appellant argues the following.
- (a) The appeal against the penalty must succeed if the main appeal succeeds.
 - (b) In the alternative, the Appellant was not "concerned in" the carrying, removing, depositing, keeping or otherwise dealing with the goods within the meaning in paragraph 4(1) Schedule 41 FA 2008.
 - (c) In the further alternative, the Appellant has a reasonable excuse within the meaning of paragraph 20 Schedule 41 FA 2008, because he did not know about the duty-unpaid cigarettes, his behaviour was entirely and obviously objectively reasonable, and he remedied his failure as soon as he had reason to suspect that duty was unpaid by cooperating fully with HMRC from the start.

29. HMRC submit that the appeals against both decisions should be dismissed.

- (1) In relation to the main appeal, HMRC argue the following.
 - (a) Regulation 10(2) HMDPR does not have the effect that every owner of a property who enters into an informal arrangement to allow another to store goods on the property will "involved in the holding" of those goods. The

Appellant was “involved in the holding” of the cigarettes due to the specific and unusual facts of this case.

- (b) The Appellant allowed an unknown person, for whom he had only a given name and mobile phone number, to store unknown goods on his property, in return for payments in cash. The legal nature of the arrangements between the Appellant and CD were furthermore entirely unclear. The written lease agreement with AB contained a clause which prohibited AB from sub-letting the unit or assigning the lease, so CD could not have taken over the rights and obligations of AB under the lease. No new written lease was entered into between the Appellant and CD. CD was thus not a normal commercial lessor of the unit. The precise legal characterisation of the arrangement with CD is not material, but CD probably only had a licence or permission to occupy the unit.
- (c) CD did not have exclusive occupation of the unit. The Appellant had a key to the unit and was entitled to enter it at any time for any purpose. A person with a licence or permission to occupy premises does not have a right of exclusive occupation of the premises.
- (d) By entering into such arrangements, the Appellant put himself at risk of dealing with someone who might be holding contraband excise goods. Despite this, and despite having unrestricted access to the unit, the Appellant exercised no due diligence at all.
- (e) If a person makes premises available for use by another person, in circumstances where they should realise that there is a greater than reasonable risk of the latter using the premises to hold contraband excise goods, without mitigating that risk, thereby in effect turning a blind eye, that person becomes “involved in the holding” of excise goods within the meaning of regulation 10(2) HMDPR, if ultimately the property is used for that purpose.
- (f) The inherent purpose of joint and several liability is to increase the authorities’ means of redress, and to strengthen effective recovery of excise duty debts. Joint and several liability is therefore intended to have a broad application (opinion of Advocate-General Tanchev in Case C-279/19, *Commissioners for Her Majesty’s Revenue and Customs v WR*, ECLI:EU:C:2021:59). The word “involved” in regulation 10(2) HMDPR must accordingly include passive as well as active involvement.
- (g) Knowledge of the nature of goods should not be required in order to be “involved in the holding” of the goods within the meaning of regulation 10(2) HMDPR.
 - (i) Knowledge of the nature of the goods is not required in order to be “holding” excise goods within the meaning of regulation 10(1) HMDPR (Case C-279/19, *Commissioners for Her Majesty’s Revenue and Customs v WR*, ECLI:EU:C:2021:473 (“*WR*”) and *Turton and Adams v Revenue & Customs* [2021] UKFTT 441 (TC) (“*Turton*”) at [33]-[41] and [70]-[77]).
 - (ii) Knowledge of the nature of the goods is not required in order to be “involved” in an irregular importation within the meaning of

regulation 12 HMDPR (*DSV Air & Sea v Revenue & Customs* [2023] UKFTT 129 (TC) at [257]).

- (iii) Regulation 10(2) HMDPR should be interpreted analogously.
- (h) Although regulation 10(2) HMDPR itself imposes no duty of due diligence, a complete lack of due diligence can be a factor relied upon to show that a person is “involved in the holding” of goods within the meaning of that provision. There are many situations, for instance in MTIC appeals, where failure to follow universally accepted good commercial practice can be a factor to be considered, even if the practice in question is not a legal requirement. The Appellant was aware of the importance of exercising due diligence: when he first leased the unit to AB, he engaged the professional services of Mr Bartlett and required proof of AB’s identity, and entered into a written lease agreement. No good reason has been given by the Appellant for failing to adopt the same practice in relation to CD.
- (i) If CD had not been found, and if HMRC had not been able to issue an assessment to him under regulation 10(1) HMDPR, then it would instead have been the Appellant who was the person “holding” the excise goods within the meaning of regulation 10(1) HMDPR.
- (2) In relation to the appeal against the penalty, HMRC argue the following.
 - (a) The words “concerned in” in paragraph 4(1) Schedule 41 FA 2008 have the same meaning as the words “involved in” in regulation 10(2) HMDPR.
 - (b) The Appellant was “concerned in” the “keeping” or “otherwise dealing” with the cigarettes, within the meaning of paragraph 4(1) Schedule 41 FA 2008, for the same reasons that he was “involved in” the “holding” of the cigarettes for purposes of regulation 10(2) HMDPR.

FINDINGS OF FACT

30. The cigarettes were brought into Unit 1 by another person. The Appellant’s only involvement was that he was the owner of the property on which Unit 1 was located, and had entered into an agreement allowing a third party to have use of the unit for the storage of goods. HMRC do not contend otherwise.

31. The Appellant’s dealings with CD were *bona fide* arm’s length business dealings on the part of the Appellant.

- (1) The evidence is that the Appellant rented out various storage spaces to different customers, and there is no suggestion that the generality of these rentals were anything other than *bona fide* arm’s length business arrangements between the Appellant and his customers.
- (2) There is no suggestion that the initial rental of Unit 1 to AB was anything other than a *bona fide* arm’s length business arrangement between the Appellant and AB. Indeed, HMRC point to the way that the Appellant dealt with AB as an example of how the Appellant should have dealt with CD (paragraph 29(1)(h) above).
- (3) There is no suggestion that the Appellant had any relationship or dealings with CD, apart from the fact that CD was using a storage unit on the Appellant’s property, for which CD was paying the Appellant.

- (4) The circumstances by which CD came to take over the use of the unit from AB were unusual, and aspects of those circumstances have not been fully explained. However, the circumstances as a whole do not lead the Tribunal to draw any inference that the Appellant's dealings with CD were anything other than *bona fide* arm's length business arrangements on the part of the Appellant.
- (a) When CD took over the use of the unit, the change in the arrangements was to the Appellant's detriment. The Appellant no longer had the protection of a written lease agreement with the person using the unit (since there was nothing in writing to say that CD had accepted the terms of the lease agreement with AB), and the Appellant received £250 per month less rent. Furthermore, the person using the unit was no longer someone vetted and chosen by the Appellant with the professional assistance of Mr Bartlett, but was someone whose identity the Appellant did not even know.
 - (b) It has not been fully explained why the Appellant would permit this change in arrangements to his detriment to occur when the written lease expressly required AB "Not to assign ..., transfer, underlet, [or] share the whole or any part of the Property or share occupation of the Property".
 - (c) The Appellant said in oral evidence at one point that he was going through a messy divorce at the time and was "all over the shop". He also mentioned in an e-mail to HMRC in October 2021 that he was dealing with a divorce and child access. He further said in oral evidence that when AB left, CD said that he would also leave if he did not receive a reduction in the rent. The Appellant was not further cross-examined about these particular facts.
 - (d) Although CD paid less than AB had been paying, HMRC have not contended that the amount paid by CD was not a fair market rent at the time that CD took over. There is no evidence that the Appellant would have received a higher rent if he had let the unit to someone else when AB left. There is no evidence as to how long it realistically would have taken the Appellant to find another tenant for the unit if he had not allowed CD to stay on. At the time in question, the lease agreement with AB had only approximately a further 7 months to run.
 - (e) The evidence does not indicate that the rental of this one particular storage unit was a significant part of the Appellant's overall business. The unit was one of several units on a farm. Presumably, the farm was the main business, and the rental of all of the storage units was merely a sideline. If so, this one single storage unit may have been a relatively insignificant part of the Appellant's overall business.
 - (f) In the circumstances, it is not implausible that the Appellant might have been sufficiently preoccupied with other personal and business issues that he simply did not have the time or energy to resist the developments involving CD, and/or that he decided that the disadvantage of what happened was not so great as to justify the time and effort of asserting his rights against AB.

32. Prior to the HMRC visit on 16 September 2020, the Appellant did not know and could not have known that duty-unpaid cigarettes (or indeed any illegal items) were being held in the unit.

- (1) There is no evidence that the Appellant actually knew that excise goods were being held in the unit, and the Tribunal sees no basis for inferring from the circumstances that he did. HMRC do not contend that he did (see paragraphs 14 and 15 above).
- (2) The Appellant did not have at his disposal the means of knowing that excise goods were being held in the unit.
 - (a) The evidence does not suggest that any of the boxes had markings indicating that they contained cigarettes or other excise goods. The witness statement of the Appellant says that “the cartons of cigarettes were contained in boxes marked as being taps and bathroom fittings”. HMRC did not seek to challenge this. The evidence does not suggest that any of the boxes were open when being carried into or out of the unit, or when stored in the unit, in a way that their contents would have been visible to the Appellant.
 - (b) Thus, the only way that the Appellant could have known the contents of the boxes would have been to open the boxes himself in order to look at their contents, or to require CD to open the boxes to allow the Appellant to inspect them. The Tribunal finds that the Appellant did not have the right to do either of these things.
 - (i) The fact that the Appellant was entitled to enter the unit “at any time for any purpose” does not mean that he himself was entitled to interfere with any goods owned by third parties that were inside the unit, including by opening any boxes. Regardless of the legal characterisation of the arrangement between the Appellant and CD, it would have defeated the purpose of that arrangement if the Appellant had been entitled to do so.
 - (ii) The written lease agreement with AB contained no clause entitling the Appellant to require AB to open boxes to allow the Appellant to inspect their contents, and there is no evidence that any oral agreement with CD would have included such a clause. Such an entitlement of the Appellant would be unusual in an arrangement of this kind.
 - (iii) The Appellant says that he had a right to inspect the unit (paragraph 28(1)(g) above), but does not say that he had a right to open any of the boxes stored in the unit, or a right to require CD to open the boxes for his inspection of their contents.
- (3) The circumstances were not such that the Appellant should have known that the only reasonable explanation for the circumstances was that the goods being stored in the unit were excise goods.
 - (a) The circumstances by which CD took over the unit from AB were to the Appellant’s detriment (paragraph 31(4)(a) above). In business dealings, there is nothing inherently suspicious about one party seeking to act in their own interests to the detriment of the other party. This was not a case where, for instance, the Appellant was offered a deal that was too good to be true.
 - (b) It may well be that it would be unusual for the owner of a property to allow another person to have the use of part of the property without knowing the identity of that person. However, this circumstance must be seen in the

context of the broader circumstances of the case referred to in paragraph 31(4) above. The Appellant did not at the outset choose CD as a tenant. The evidence suggests that he simply failed to resist what AB and CD subsequently decided to do.

- (c) The fact that the Appellant did not use the services of Mr Bartlett or a similar professional when CD took over the use of the unit, the fact that CD paid in cash, and the fact that no formal written agreement was entered into between the Appellant and CD, also need to be seen in the context of the broader circumstances of the case referred to in paragraph 31(4) above. In practice, business agreements are sometimes concluded informally and orally, and payments made in cash. The evidence is that most of the cash payments were included in the Appellant's business accounts. There is therefore no suggestion that the Appellant took cash payments in order to conceal the fact that the unit was being used or that the payments had been received.
- (d) The cash payments for February, March and July 2020 were not included in the Appellant's business accounts. Although the reason for this has not been adequately explained, this does not inherently suggest that the unit was being used for any unlawful purpose.

FINDINGS OF LAW

Regulation 10(1) HMDPR

33. The HMDPR were made to transpose into UK law Council Directive 2008/118/EC (the “**2008 Directive**”) (which was repealed in the EU in 2023). For purposes of Article 8(1)(b) of the 2008 Directive and regulation 10(1) HMDPR, a person is “holding” excise goods if the person is in physical possession of the goods, within the usual meaning of the expression “physical possession” as used in everyday language. It is irrelevant whether that person has any right to or interest in the goods. It is also irrelevant whether or not that person is aware or should reasonably be aware that the goods are subject to excise duty, or that they have become chargeable to any excise duty to which they are subject. A person can be “holding” duty-unpaid cigarettes for purposes of the 2008 Directive and the 2010 Regulations, both in circumstances (1) where the person knows that the goods they are holding are cigarettes or unspecified excise goods but does not know that they have become chargeable to any excise duty or that the excise duty has not been paid, and (2) where the person does not even know that the goods they are holding are cigarettes or unspecified excise goods. (See Case C-279/19, *Commissioners for Her Majesty's Revenue and Customs v WR*, ECLI:EU:C:2021:473; *Turton* at [33]-[41] and [70]-[77]; *Revenue And Customs v Perfect* [2022] EWCA Civ 330 (“*Perfect*”) at [22]-[23].)

34. It may be that a person may also or instead be “holding” goods if they have relevant control over another person who has physical possession of the goods, in particular in the case of an employer who directs an employee to take physical possession of goods on behalf of the employer: see *Hartleb T/A Hartleb Transport v Commissioners for His Majesty's Revenue and Customs* [2024] UKUT 34 (TCC) at [89]-[95]; *Kent Couriers Ltd v Revenue And Customs* [2024] UKFTT 145 at [23]-[31]; and *Antelope Transport Limited v Revenue & Customs* [2024] UKFTT 307 (TC) at [87]-[91]. These decisions postdate the hearing of the present appeal and were not referred to by the parties in argument. The Tribunal has not found it necessary to invite further submissions of the parties on these cases, since the present case does not arguably involve any situation of this type.

35. Other than in situations of the kind referred to in the previous paragraph, a person who does not have physical possession of excise goods within the usual meaning of that expression as used in everyday language is not “holding” those excise goods for purposes of regulation 10(1) HMDPR.

36. A person does not have such physical possession of excise goods merely because they own the property on which the goods are being held by a third party. A hotelier does not, merely by reason of owning the hotel premises, have physical possession within the meaning of regulation 10(1) HMDPR of all goods that hotel guests bring into their hotel rooms during their stay. The occupier of a residential property does not, merely by reason of being in occupation of the premises, have physical possession of all goods that guests may be carrying with them while visiting. The operator of an airport or harbour does not, merely by reason of its control over the site, have physical possession of all goods that may be on board ships or aircraft using the facility, or which may be carried by passengers while in terminal buildings. A self-storage unit business does not, merely by reason of its ownership or occupation of its site, have physical possession of all goods that its customers store in the self-storage units.

37. Furthermore, a person does not have such physical possession of goods belonging to a third party merely because they enter the building in which the goods are being held, even if they are the only person present in the building at the time, and even if there is no other person who is realistically able to enter the building at that particular time. For instance, suppose that person A, who is about to depart on an international trip, gives a key to their home to their neighbor B, and asks B to water their pot plants while they are away. It cannot tenably be suggested that B, on entering A’s house to water the pot plants as a favour to A, would thereupon for that reason alone become a holder of any excise goods that A may be keeping in the house. The position would be the same even if A’s home was owned by B, and A was B’s tenant. The position would furthermore be the same, even if B was entering A’s home as A’s landlord, as of right, to conduct an inspection of the premises in A’s absence.

38. These situations are distinguishable from cases such as *WR / Perfect* and *Turton*.

- (1) *WR / Perfect* involved a lorry driver, who was clearly in physical possession of the goods being carried on the lorry that he was driving.
- (2) In *Turton*, the Tribunal found that an appellant had physical possession of all of the boxes of cigarettes in a lock-up in circumstances where he had been given the keys to the lock-up with the task of handing over four of the boxes to someone who would come to collect them, and in circumstances where he was aware that he was being entrusted with the care and control of all of the boxes in the unit for the time that he was in the unit, and was aware that he was expected to exercise diligence and care in relation to all of the boxes in the lock-up as a whole. (See *Turton* at [42]-[56].) The Tribunal did not find in *Turton* that the appellant had physical possession of all cigarettes in the lock-up by reason alone of the fact that he had a key to the lock-up, and had used it to enter the lockup, and had been alone in the lockup.

Regulation 10(2) HMDPR

39. In circumstances where the owner of premises has permitted a third party to store goods on the premises, and in which the owner of the premises otherwise has no involvement in the holding of those goods, the owner of the premises will only be “involved in the holding” of excise goods within the meaning of regulation 10(2) HMDPR if they know or should know that the goods being held on the property by the third party are excise goods.

- (1) The words “involved in the holding” of excise goods in regulation 10(2) HMDPR are intended to have the same meaning as in Article 8(1)(b) of the 2008 Directive. The words as used in the 2008 Directive were intended to have an autonomous and uniform meaning throughout the European Union, determined according to the usual meaning of those terms in everyday language. That meaning is not to be ascertained by reference to particular legal concepts in the legal system of any one country. (See *WR* at [23]; *Dawson’s (Wales) Ltd v Revenue & Customs* [2023] EWCA Civ 332 at [70]; *Turton* at [74].)
- (2) There is very little case law on the meaning of the words “involved in the holding” in this provision. The Tribunal has not taken into account the judgment of the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) in *X-Z v Staatsecretaris van Financiën*, 2 May 2021, ECLI:NL:HR:2021:169, to which the parties did not refer in argument.
- (3) In everyday language, the expression “involved in” is commonly used to have a meaning similar to “participate in” or “take part in”.
- (4) If an owner of premises permits a third party to hold unspecified goods on the premises, and if the third party in exercise of that permission holds contraband excise goods on the premises, the owner of the premises will not for that reason alone be “involved in the holding” of excise goods within the meaning of regulation 10(2) HMDPR. The examples in paragraph 36 above of what will not of itself amount to “holding” for purposes of regulation 10(1) HMDPR are also examples of what will not of itself amount to being “involved in the holding” for purposes of regulation 10(2). HMRC accept this (paragraph 29(1)(a) above).
- (5) However, an owner of premises *would* be “involved in the holding” of excise goods within the meaning of regulation 10(2) HMDPR if, for instance, they made the premises available to a third party for storage of goods, with knowledge that the goods to be stored there by the third party are duty-unpaid cigarettes.
- (6) The precise degree of knowledge required on the part of the owner of the premises in this type of situation in order for them to be “involved in the holding” of excise goods has not previously been considered in the case law.
- (7) HMRC contend that the owner of the premises will in this kind of situation be “involved in the holding” of excise goods if they should have realised that there is a greater than reasonable risk of the premises being used by the third party to hold contraband excise goods, and if they nonetheless fail to mitigate that risk (paragraph 29(1)(e) above). However, no legal basis for that test is given by HMRC.
- (8) The Tribunal considers that the test proposed by HMRC is too uncertain and difficult to apply, and is too onerous a test for the owner of the premises. In all of the types of situations referred to in paragraph 36 above, and in all similar types of situations, there will be a risk that users of the premises will bring contraband excise goods onto the premises. There is no standard for defining what is a “greater than reasonable risk” in all of these different types of situations, or for defining what will constitute sufficient measures to mitigate the risk.
- (9) At the hearing, HMRC drew an analogy with MTIC cases (paragraph 29(1)(h) above). However, in an MTIC case, a taxable person will be regarded as a “participant” in fraud only if they knew or should have known that, by their purchase, they were taking part in a transaction connected with fraudulent evasion

of VAT (Joined Cases C-439/04 and C-440/04, *Kittel v Belgium*; *Belgium v Recolta Recycling*, ECLI:EU:C:2006:446 (“*Kittel*”) at [56]).

- (10) The Tribunal considers that it would be principled for a similar test to apply in the kind of situation with which the present appeal is concerned. Although the parties did not cite any particular MTIC cases in argument, the Tribunal does not deem it necessary to seek further submissions of the parties on such cases, given that MTIC cases were expressly referred to in argument in a general way. By analogy with such cases (compare, for example, *Kittel* at [56]-[61]; *Mobilx Ltd & Ors v HM Revenue & Customs* [2010] EWCA Civ 517, [2010] STC 1436 at [51]-[52], [55], [59]-[60]), the Tribunal finds that the test under regulation 10(2) HMDPR in the kind of situation with which this appeal is concerned is as follows:
- (a) The owner of premises will only be “involved in the holding” of excise goods held by a third party on the premises if the owner knows or should know that the goods in question are (or include) excise goods.
 - (b) The owner of premises should know that goods held by a third party on the premises are (or include) excise goods if they have the means at their disposal of knowing that, but fail to deploy that available means of knowledge.
 - (c) The owner of premises should know that goods held by a third party on the premises are (or include) excise goods if they should know that the only reasonable explanation for the circumstances is that the goods being held on the premises are (or include) excise goods.
 - (d) It is not enough that the owner of premises should know that they are running a risk that goods held on the premises by a third party are excise goods. If it was sufficient to show that they should know that they are running a risk, the principle of legal certainty would be infringed. Nor is it enough that the owner of premises should know that it is more likely than not that goods held on the premises by a third party are excise goods.
- (11) In the present case, the Tribunal is concerned solely with circumstances where the owner of premises has permitted a third party to hold goods on the premises, and in which the owner of the premises otherwise has no involvement in the holding of those goods. It is unnecessary for purposes of the present appeal to determine all of the other kinds of circumstances in which a person might be found to be “involved in the holding” of excise goods for purposes of regulation 10(2) HMDPR, or whether in other kinds of circumstances a person might be “involved in the holding” of excise goods despite having no knowledge that the goods are excise goods.

Paragraph 4(1) Schedule 41 FA 2008

40. The term “possession” in paragraph 4(1) Schedule 41 FA 2008 includes “physical possession” in the sense described in paragraph 33 above.

41. The term “concerned in” in paragraph 4(1) Schedule 41 FA 2008 has the same meaning as the term “involved in” in regulation 10(2) HMDPR. This is because the term “concerned in” is not defined for purposes of this provision, and the ordinary meaning of that term is the same as that of the term “involved in”.

42. The word “keeping” is not defined for purposes of paragraph 4(1) Schedule 41 FA 2008. HMRC contend that this expression “amounts to custody of (in the sense of possession or control) or looking after”. The Appellant appears to agree, adding that it requires

“something active” such as a power to prevent others from taking the item. For purposes of this case, the Tribunal assumes that the HMRC definition is correct.

43. The word “otherwise” that appears before the words “dealing with” in paragraph 4(1) Schedule 41 FA 2008 indicates that the previous words “carrying, removing, depositing, keeping” are themselves all forms of “dealing with”. This suggests that the words “dealing with” include all forms of handling excise goods. Paragraph 8(6) Schedule 41 FA 2008 further provides that “dealing with” includes “a transfer of property” and “the creation or termination of a right, interest or estate in property”. The term “dealing with” thus also refers to bringing about changes in rights or interests held in excise goods.

REASONS FOR DECISION

44. The Appellant was not “holding” the cigarettes within the meaning of regulation 10(1) HMDPR.

- (1) The Appellant did not have physical possession of the cigarettes within the usual meaning of that expression as used in everyday language (see paragraphs 30, 31(2)(b) and 33-35 above).
- (2) The fact that the Appellant was the owner of the farm on which the unit was located, and the fact that he was entitled to and did enter the unit, does not of itself mean that he was entitled to or did take possession of any goods owned by third parties that were inside the unit (see paragraphs 31, 32(2)(b) and 36-38 above).
- (3) The evidence does not establish the existence of any other circumstances on the basis of which a finding could be made that the Appellant had physical possession of the cigarettes.

45. The Appellant was not “involved in the holding” of the cigarettes within the meaning of regulation 10(2) HMDPR.

- (1) The Appellant did not know that excise goods were being held in the unit (paragraphs 32(1) and 39(10)(a) above).
- (2) The Appellant did not have at his disposal the means of knowing that excise goods were being held in the unit (paragraphs 32(2) and 39(10)(a) and (b) above). The Appellant’s dealings with CD were *bona fide* arm’s length business dealings on the part of the Appellant (paragraph 31 above). There is no suggestion that the Appellant had any relationship or dealings with CD, apart from the fact that CD was using a storage unit on the Appellant’s property, for which CD was paying the Appellant (paragraph 31(3) above). Even if the Appellant had required CD to provide proof of his identity, to enter into a formal written lease agreement, and to pay by bank transfer rather than cash, this is unlikely to have revealed to the Appellant that duty-unpaid cigarettes were being held in the unit. No evidence suggests that it would have made any difference.
- (3) The circumstances were not such that the Appellant should have known that the only reasonable explanation for the circumstances was that the goods being stored in the unit were excise goods (paragraphs 32(3) and 39(10)(a) and (c) above).

46. The Appellant is therefore not liable under regulation 10 HMDPR to pay the duty, and the assessment must be quashed.

47. The Appellant did not “acquire possession of” the cigarettes, and was not “concerned in carrying, removing, depositing, keeping or otherwise dealing with” the cigarettes within the meaning of paragraph 4(1) Schedule 41 FA 2008.

- (1) The Appellant did not acquire “possession” of the cigarettes within the meaning described in paragraphs 33 and 35-38 above, for the same reason that he was not “holding” the goods within the meaning of regulation 10(1) HMDPR (paragraph 44 above).
- (2) The Appellant did not acquire legal possession under common law, given that there is no evidence that he had any intention to possess the cigarettes or ever sought to exercise control over them, and no evidence that CD or anyone else ever purported to transfer possession to him.
- (3) There is no suggestion that the Appellant was ever concerned in “carrying, removing, [or] depositing” the cigarettes.
- (4) The Appellant was not concerned in “dealing with” the cigarettes, as there is no evidence that he was ever concerned in handling them in any way or in bringing about any changes in rights or interests held in them (paragraph 43 above).
- (5) The Appellant was not “concerned in” the “keeping” of the cigarettes for the same reason that he was not “involved in” the “holding” of them within the meaning of regulation 10(2) HMDPR (paragraphs 42 and 44 above).

48. The Appellant is therefore not liable to a penalty under paragraph 4(1) Schedule 41 FA 2008, and the penalty must be cancelled.

49. Given the findings above, it is unnecessary to determine whether it is a precondition for liability under regulation 10(2) HMDPR that the identity of the person liable under regulation 10(1) HMDPR be known. It may well be that the wording of regulation 10 assumes that for a person to be liable under regulation 10(2), there must be another person who is liable under regulation 10(1). However, even if so, it does not necessarily assume that the identity of that other person must be known. In the kind of situation with which the present appeal is concerned, the owner of the premises would not become the “holder” of the excise goods within the meaning of regulation 10(1), by reason alone that the identity of the other person is not known (contrast the HMRC submission at paragraph 29(1)(i) above).

50. Although this decision does not state the names of the persons referred to above as “AB” and “CD”, no order for anonymity has been made. This decision simply omits any reference to their names because they were not parties to these proceedings, and were not able to respond to anything said about them in the proceedings, and knowledge of their names is not necessary in order to understand the decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

Release date: 23rd May 2024