Neutral Citation: [2024] UKFTT 1105 (TC)

Case Number: TC09379

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/19389

Excise Duty Assessment, determination of excise duty point under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, failure to provide a movement guarantee under regulation 39(1)(a). Appeal dismissed.

Heard on: 29 April 2024
Judgment date: 9 December 2024

Before

JUDGE VIMAL TILAKAPALA
TRIBUNAL MEMBER JOHN AGBOOLA

Between

POCKETFUL OF STONES LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nick Daves of NHD Tax Solutions Ltd

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

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video and the remote platform the Tribunal video hearing system.

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 is a distillery which has authorised warehouse keeper status for the purpose of the excise duty regime

4. This is an appeal by the Appellant against an excise duty assessment (the "Assessment") issued by the Respondent ("HMRC") on 21 September 2021 for an amount of £38,626 relating to 3,360 litres of gin (the "Goods"). The Assessment was made on the basis that the Goods were despatched from the Appellant's warehouse without a movement guarantee being in place and so in contravention of excise duty suspension requirements.

5. We were provided with a hearing bundle of 847 pages, an authorities bundle and skeleton arguments from Mr Davies and Ms Brown. We heard evidence from Mr Michael Cunliffe a director of the Appellant and HMRC officer Ms Kelly Thomas.

THE BACKGROUND AND RELEVANT FACTS

6. Before setting out the facts it is necessary to summarise at a high level how the excise duty suspension system works (or at the relevant time worked) for excise goods transported within the UK or between the EU and Northern Ireland.

7. All such movements are required to be covered by financial security in the form of a "movement guarantee" in favour of HMRC from an HMRC approved provider, with it being the warehouse keeper or consignor's responsibility by default to provide that guarantee. Details of the guarantee are required to be recorded on the movement documentation. The guarantee is intended to cover unpaid excise duties.

8. All movements of excise duty suspended goods must also be recorded on the "Excise Movement and Control System" ("EMCS"). This system documents the movement of those goods at each stage via an electronic administrative document – an "eAD" with each movement being given an "ARC Code" once validated by the EMCS.

9. When validated, the EMCS status of a movement of goods is shown as "accepted" by the consignee, when the consignee receives the goods it is required to submit a "report of receipt" following which the EMCS status is updated to "delivered". At this stage the consignor can discharge the applicable movement guarantee.

10. The Appellant is a leading independent producer of gin in the UK.

11. The Appellant was contacted by email on 7 August 2020 by a potential new customer claiming to be Vernet Distribution, part of the LeClerc French supermarket chain (the "Customer").

12. The Appellant carried out extensive due diligence checks prior to accepting the order. It also checked with the receiving warehouse who were able to confirm that the Appellant "was on their system" but was unable to give further details as they were not an account holder. (see the witness evidence below for further information on the due diligence checks).

13. Following a series of emails the Customer placed an order on 2 Sept 2020 for 6000 bottles of gin, with the Customer confirming that it would arrange collection and transport.

14. The Appellant had sufficient stock to deliver 4,800 bottles and advised the Customer that these would be ready for collection from 28 September 2020.

15. The Customer arranged to collect the Goods on 29 Sept 2020, providing details of the receiving warehouse (in France) and the registration of the collection vehicle.

16. The Goods were collected on 29 September 2020 and the appropriate ARC paperwork provided by the Appellant.

17. The Appellant raised an invoice for the Goods on the same day.

18. The Appellant input the movement on to the ECMS system and the order was shown on the ECMS system as accepted by the French warehouse.

19. The ECMS status was not updated to delivered as the Goods were not received by the warehouse.

20. The Customer did not pay for the Goods and the Appellant lost contact with it. It appears that the Customer was not a legitimate business and that it "hijacked" the details of a legitimate business. The Appellant reported the incident to Action Fraud on 9 December 2020.

21. HMRC became aware of an unreceipted ARC code – where the Appellant was consignor and opened an enquiry on 11 March 2021 as the ECMS system failed to confirm that the goods had been delivered.

22. The actual destination of the Goods has not been established. HMRC began a request for mutual assistance from the French authorities. However this did not establish where the Goods were delivered to. The movements of the vehicle used to collect the Goods have also not been traced.

23. The Assessment was issued by HMRC on 21 September 2021.

24. On 21 December 2021 the Appellant lodged a notice of appeal against the Assessment.

25. On 26 April 2022 HMRC issued a Hardship Certificate pursuant to s.16(3)(a) (ii) Finance Act 1994 ("FA 94") allowing the Tribunal to entertain the Appeal notwithstanding the requirement under s.163 FA 94 for payment or deposit of the amount in dispute to be made in order for an appeal to proceed.

26. An alternative dispute resolution process followed which ended unsuccessfully on 1 December 2022.

The witness evidence

Mike Cunliffe

27. Mr Cunliffe is a director of the Appellant and was the person who dealt with the Customer and the particular order. The following is a summary of the facts found from his witness evidence:

(1) At the time the Appellant was contacted by the Customer, it was involved in conversations with several European markets, Australian and New Zealand and at least one UK based supermarket as to potential supplies. Business was also increasing significantly. Being contacted by a customer claiming to represent a large French supermarket was not in that context therefore out of the ordinary.

(2) Mr Cunliffe ensured that a range of due diligence checks were carried out on the Customer. These included official checks – involving a search of corporate records, bank checks and checks involving social media, internet searches, checks for scam warnings and industry checks. References were also requested and received

(3) The Customer due diligence was carried out by the Appellant itself and its accountant. A French speaker was used to assist with the checks.

(4) The Customer contracts were signed by the Customer and stamped with the Vernet stamp.

(5) The Appellant also attempted to check that the named receiving warehouse was duly authorised. Confirmation was obtained that the warehouse had the Appellant listed as a supplier but details of orders could not be provided by the warehouse as the Appellant was not its customer.

(6) It was normal procedure for international customers to arrange collection

(7) On collection of the Goods an employee of the Appellant took a photograph of the truck used for collection.

(8) Following collection the Appellant emailed a person who they considered to be the president of Vernet to check if the Goods had been received. A reply was received confirming receipt.

(9) It became apparent in November 2020 that the Goods had not been received by the warehouse and that the Appellant was not going to be paid. At this stage the Appellant became aware that it had been defrauded and notified "Action Fraud".

(10) Prior to the order of the Goods, the Appellant had been involved in at least 13 movements of excise goods to EU member states and 9 movements of excise goods within the UK, all without a movement guarantee in place. HMRC had not raised any issues or concerns.

(11) Mr Cunliffe thought that HMRC guidance at the time on movement guarantees, including who could provide them, was out of date and inaccurate. He also considered that the procedures in place for verifying deliveries was chaotic as a result, in part, of the UK leaving the EU.

(12) Mr Cunliffe accepted that the Appellant was a registered warehouse keeper and that it was consignor of the Goods.

(13) Mr Cunliffe also accepted that no movement guarantee was in place for the particular movement of the Goods. He did not dispute that the Appellant had entered itself on the ECMS as responsible for the movement guarantee.

Kelly Thomas

28. HMRC Officer Thomas is a Higher Excise Officer and was the HMRC officer responsible for the matter. The following is a summary of the facts found from her witness evidence:

(1) Officer Thomas accepted that the Appellant had been the victim of fraud.

(2) Officer Thomas' initial enquires were prompted by there being no report of receipt issued for the Goods. This meant that she had to investigate the reason for that and consider if an excise duty point had occurred.

(3) For excise goods movements the ECMS requires a box to be ticked to indicate who was providing HMRC with the movement guarantee. She established that for the relevant movement the Appellant had ticked the box to indicate that it was providing the guarantee.

(4) Officer Thomas made contact with Shaun Bebington at the Appellant to discuss the matter. He was unaware that the ARC was open and that the status of the Goods had not been changed to indicate receipt.

(5) Mr Bebington told Officer Thomas that Mr Cunliffe had handled the transaction. He also explained that the Appellant had carried out several due diligence checks on the Customer.

(6) Mr Bebington told Officer Thomas that the Customer had provided the movement guarantee. He was, however, unable to provide any paperwork to show the existence of that guarantee. It transpired that he was mistaken.

(7) Having established that the Appellant had indicated itself as provider of the Movement Guarantee and that the Goods had not reached the receiving warehouse, Ms Kelly advised the Appellant that it appeared that an error had occurred which could give rise to an excise penalty. She provided fact sheet FS9 (The Human Rights Act and Penalties) and Factsheet FS12 (Penalties for VAT and Excise Wrongdoing) to the Appellant.

(8) Officer Thomas subsequently sent the Appellant a list of questions and a request for documentation in respect of the movement – which the Appellant provided promptly. That information included details of the due diligence steps undertaken. It also stated that the Appellant had assumed that the required Movement Guarantee was provided by their insurance company.

(9) Officer Thomas was able to trace the registered keeper of the truck used to collect the Goods. However, the keeper provided no helpful information and had simply informed HMRC that he had spoken to the police.

(10) She accepted that the registration of the haulage vehicle was the same as that of another vehicle involved in a similar case.

(11) Border Force was not contacted to check if the vehicle had travelled outside the UK. This was not necessary for Officer Thomas' investigation as the excise duty point was clearly identifiable. This was departure of the goods from the Appellant's warehouse – in the absence of a movement guarantee.

(12) HMRC was unable to check directly with the French warehouse to see if the Goods had been received. This had to be done via the mutual assistance process with the French tax authorities. Officer Thomas initiated that process and chased several times. No response was received.

(13) Officer Thomas' efforts to try and find further facts was not driven by the need to support the Assessment. It was driven by her interest to find out more as it was clearly in the interests of HMRC and protection of the excise duty system to do so.

THE GROUNDS OF APPEAL

29. The Appellant listed its grounds of appeal as follows:

(1) "That HMRC have not fully and properly investigated with sufficient rigour where the duty point arose".

(2) "HMRC have not adequately considered s.5 Ch V point 2 of the 2008 Directive with regard to seeking to identify the member state in which the irregularity occurred or the assessable person, that being someone who participated in the irregularity".

(3) "HMRC's exercise of choice of which sequential holder of the goods to assess has resulted in a disproportionate and unfair outcome".

(4) "HMRC have elected to apply Strict Liability without properly considering reasonable excuse. It is noted that the requirement to exercise strict liability is not expressly stated in the 2008 Directive, and we submit that it would have been if considered to be a critical requirement. HMRC's action therefore offends the overriding principle of proportionality and fairness".

Proposed New Ground of Appeal

30. Mr Davies sought at the hearing to introduce a new ground of appeal. The proposed new ground was, broadly, that the Goods had been physically stolen from the Appellant's warehouse, with the lorry driver taking the goods from the warehouse and loading his vehicle himself without the involvement of the Appellant. On this basis Mr Davies wanted to argue that there had been no movement of goods for the purpose of the excise goods regime or that if there was, it was over which the Appellant had no control. A consequence of this was, in his view, that the Appellant should not have entered the movement on to the ECMS and the movement guarantee requirements were inapplicable.

31. Not only was this an entirely new argument but it was inconsistent with the Appellant's statement of case and the evidence provided to the Tribunal. Mr Davies said that it was based on new evidence which had been recently discovered.

32. Mr Davies sought to make an ad-hoc application for permission to amend the grounds of appeal.

33. Ms Brown opposed that application, stating that HMRC were of course not aware of the new ground and had no time to consider it.

Principles for considering proposed amendment

34. The Tribunal has discretion to allow an application to amend pleadings,

35. The principles applicable to considering 'very late applications' were summarised by Carr J at [38] in *Quah*: *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 ('*Quah*').

36. The relevant principles can be stated simply as follows:

(1) Whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

(2) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

(3) A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

(4) Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a

fair appreciation of the consequences in terms of work wasted and consequential work to be done;

(5) Gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

(6) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay; and

(7) A much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.'

37. The principles outline in *Quah* are directly relevant to this Tribunal, as illustrated by the Upper Tribunal in *Denley v HMRC* [2017] UKUT 340 (TCC).

38. Taking these principles into account, we did not give permission for the new ground to be admitted.

39. In reaching our decision we noted the following:

(1) The proposed new ground was being raised for the first time part way through the actual hearing;

(2) The proposed new ground was inconsistent with the evidence before us (including the sworn witness statement of Mr Cunliffe and the Appellant's consistent description of events in its dealings with HMRC);

(3) The movement of goods in question was in September 2020, the Appeal against the Assessment made in December 2021 and so new facts were being introduced a long time after the events in question. We could discern no clear reasons as to why new facts were being presented so late.

(4) The amount of time that the matter had been running - which included an ADR process.

(5) HMRC's objection to the new ground being admitted at such a late stage and with no notice.

THE BURDEN OF PROOF

40. The Appellant's liability for this Assessment has arisen as a result of s.12(1)(a) FA 94 and is one the quantum of which can be determined under s.12(1A) FA 94. The default rule is therefore that it is the Appellant who must show that the grounds on which their appeal is brought are established (s.16(6) FA 94). There are limited circumstances in which the burden of proof lies with HMRC as set out in s.16(6)(a) –(c). None of these circumstances are, however, relevant in the context of this Appeal.

41. The burden of proof in this appeal lies therefore with the Appellant who must show that the grounds on which their appeal is brought are established (s.16(6) FA 94).

42. The standard of proof is the usual civil standard which is the balance of probabilities.

Relevant Legislation

EU legislation

43. The relevant EU legislation is Council Directive 2008/118/EC (the "Directive"). This had effect in the UK at the time of the movement of Goods, which occurred during the 'transition period' of the UK's withdrawal from the EU, in accordance with s.1A (3)(e) of the European Union (Withdrawal) Act 2018.

44. Paragraph 19 of the preamble to the Directive emphasises the importance of a movement guarantee in the safeguarding of excise duty, stating as follows:

> "In order to safeguard the payment of excise duty in a case of non-discharge of the excise movement, Member States should require a guarantee, which should be lodged by the authorised warehouse keeper of dispatch or the registered consignor or, if the member State of dispatch so allows, by another person involved in the movement, under the conditions set by the member States."

45. Article 18 of the Directive confirms the necessity for a guarantee for the movement of goods under duty suspension, providing at 18(1):

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

46. The Directive also provides as follows:

> Article 4
>
> For the purpose of this Directive as well as its implementing provisions, the following definitions shall apply:
>
> 1. 'authorised warehousekeeper' means a natural or legal person authorised by the competent authorities of a Member State, in the course of his business, to produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse;
>
> …
>
> 7. 'duty suspension arrangement' means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a custom's suspensive procedure or arrangement, excise duty being suspended:
>
> Article 7
>
> 1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.
>
> 2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:
>
> (a) the departure of excise goods, including the irregular departure, from a duty suspension arrangement.....
>
> Article 8
>
> 1. The person liable to pay the excise duty that has become chargeable shall be:

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

(i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;

Article 10

…

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

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

…

6. For the purposes of this Article, 'irregularity' shall mean a situation occurring during a movement of excise goods under a duty suspension arrangement, other than the one referred to in Article 7(4), due to which a movement or a part of a movement of excise goods, has not ended in accordance with Article 20(2)

Domestic law

47. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010/593 (the 'HMDP Regulations') implement the Directive into domestic law. The relevant provisions are considered in our discussion below. They are summarised, so far as relevant, as follows:

48. Regulation 5(1) provides that "there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom".

49. Regulation 6 defines when excise goods are considered to have been "released for consumption in the UK". Regulation 6(1)(a) provides that this is when the goods "leave a duty suspension arrangement".

50. Regulation 7(1) defines when excise goods "leave a duty suspension arrangement", and this will happen inter alia, under Regulation 7(1)(a)(ii) when "they leave any tax warehouse in the United Kingdom" other than in "accordance with the conditions specified in regulation 39".

51. Regulation 8 provided at the relevant time that subject to Regulation 9 the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(a)

is the authorised warehouse keeper, the UK registered consignee or any other person releasing the excise goods.

52. Regulation 9(1)(a) provided at the relevant time, that the person liable to pay the duty when excise goods are released for consumption by virtue of an "irregularity" in the course of a movement of goods under a duty suspension arrangement which occurs in the UK, that the person liable to pay the duty was in a case where a guarantee was required, the person who provided the guarantee.

53. Regulation 39 makes provision for movement conditions of excise duty suspended Goods, with regulation 39(1) providing that "Except for movements between tax warehouses which the Commissioners may specify in a notice, excise goods may not be moved under duty suspension arrangements unless", as per regulation 39(1)(a) "the risks inherent in the movement are covered by an approved guarantee provided by the authorised warehouse keeper of dispatch, the registered consignor or any other person the Commissioners may allow in accordance with paragraph (2) which secures such amount of the duty chargeable on the goods as the Commissioners may require".

54. There is no real dispute as to the facts in this case and it is accepted that the Appellant has, unfortunately, been the victim of fraud.

55. It is also apparent that the Appellant took care to carry out due diligence and take the steps it considered necessary to verify the identity of the Customer and the genuineness of the order. There is no suggestion that the Appellant has acted improperly.

56. However, notwithstanding the Appellant's position, excise duty which ought to have been paid has not been paid and so it is necessary to consider how the applicable legislation determines liability for that duty.

SUBMISSIONS

57. Mr Davies' skeleton argument contained a lengthy list of arguments some of which overlapped. The arguments were not straightforward to categorise and did not necessarily relate directly to the Grounds of Appeal as they were stated.

Rather than list each of Mr Davies' arguments, we have summarised them as follows:

(1) HMRC had not done enough to investigate the fraud and to ascertain what had happened and where the Goods ended up;

(2) HMRC could not prove that the Goods had left the UK;

(3) The Appellant believed it had a movement guarantee in place and that HMRC were at fault for not alerting them to the fact that they did not, despite HMRC being aware that several movement of goods had taken place in the absence of the guarantee;

(4) The burden of proof in this Appeal was with HMRC and HMRC had failed to discharge that burden.

(5) The excise duty point was in France and not in the UK.

(6) The Goods were not released for consumption in the UK.

(7) That there were clearly other parties involved in the events which led to the non-payment of excise duty, who should be jointly and severally liable but HMRC had chosen not to pursue them.

(8) The Appellants should not be liable for the excise duty as "Regulation 18 of the Act" provides that the person liable to pay the duty is the person holding the excise goods at the excise duty point.

(9) That HMRC was not, as per *B&M Retail Limited v HMRC* [2016] UKUT 429 (TCC), bound to assess at what it may consider to be the first duty point.

(10) There should not be strict liability. The approach outlined in *Greenalls Management Limited v HMRC* [2005] UKHL 34 whilst appropriate for a large distillery run by experienced people is not appropriate for a small distillery run by relatively inexperienced people.

58. Ms Brown submitted, in essence, that:

(1) The burden of proof was on the Appellant and not HMRC.

(2) The excise duty point was clear as a matter of law under both the HMDP Regulations and the Directive and arose as a consequence of the Appellant not having a movement guarantee in place.

(3) The excise duty regime was generally a strict liability regime and so culpability was not a factor in determining liability.

(4) That HMRC had no discretion as to who to assess in the circumstances, as confirmed in B&M Retail.

(5) That any challenge to HMRC's approach to investigating further details of the case and details of those involved in the fraud was not a matter for the Tribunal.

59. Rather than respond to Mr Davies' points separately it is more efficient to address them collectively under the following headings (most of which were used by Ms Brown in her skeleton argument and her submissions).

DISCUSSION

The Burden of Proof

60. The burden of proof lies with the Appellant and not HMRC in this case. We have outlined the relevant provisions at [40] – [41] above.

The Excise Duty Point Issue

61. The excise duty point is clear under the provisions of the HMDP Regulations and the Directive.

62. Regulation 5 of the HMDP Regulations provides that an excise duty point occurs when there is a "release for consumption" of those excise goods in the United Kingdom. Under Regulation 6(1)(a) there is a "release for consumption in the United Kingdom" when the goods "leave a duty suspension arrangement". Regulation 7(1)(a) provides that goods leave a duty suspension arrangement at the time they leave a tax warehouse in the U.K. unless they are moved in accordance with conditions specified in Regulation 39. Regulation 39(1)(a) provides that except for movements of goods between tax warehouses specified by HMRC in a notice, there must be an approved guarantee in place provided by the authorised warehouse keeper of despatch, the registered consignor or such other persons as HMRC may allow by notice.

63. As no movement guarantee was in place, the conditions in Regulation 39 were not satisfied and so the excise duty point arose when the Goods left the Appellants warehouse.

64. Regulations 8 and 9 place the liability for that duty on the person who provided the movement guarantee if one was required – as it was in this case.

65. The domestic provisions follow those of the Directive.

66. It is difficult therefore to identify a basis on which Mr Davies can sustainably argue that the excise duty point has either not arisen or that it has arisen elsewhere.

67. Ms Brown referred in her submissions to Article 10 of the Directive which she thought might be a provision relied upon by the Appellant. Article 10 provides in which member state an excise duty point is to be treated as taking place where an "irregularity" has occurred on a departure of goods from a duty suspension arrangement which has given rise to their release for consumption. Article 10(1) provides the basic rule that the release for consumption is to be treated as taking place in the member state in which the irregularity occurs. Article 10(2) provides that where it is not possible to determine where the irregularity occurred, it is deemed to have occurred in the Member State in which the irregularity was detected. "Irregularity" is defined in Article 10(6) as, so far as relevant, a situation occurring during a movement of excise goods under a duty suspension arrangement which has not ended in accordance with Article 20(2). A movement of excise goods will, again so far as relevant, end in accordance with Article 20(2), when the consignee takes delivery (as per Article 17(1)(a)(i) and (ii)).

68. Ms Brown submitted that an argument that the Excise Duty point arose in France could not succeed on the facts of this case. She pointed out that there was simply no evidence that the Goods had arrived in France nor had the French authorities been able to confirm, pursuant to the mutual assistance request, that the Goods had been received in France. She added that HMRC had contacted the consignee and the transport company but no further information or assistance had been provided. She also reminded us that discovery of the issue, prompted by the unclosed ECMS entry, was made by HMRC in the UK.

69. We agree with Ms Brown that the excise duty point is clearly in the UK and that it arose when the Goods left the Appellant's warehouse, the trigger being the lack of a movement guarantee covering that movement.

HMRC's decision to assess the Appellant rather than anyone else involved in the fraud

70. In terms of HMRC's decision to assess the Appellant rather than anyone else involved in the arrangements, both parties referred us to the Upper Tribunal decision in *B&M Retail*.

71. Ms Brown saw it as upholding HMRC's policy to assess a person against the earliest point in time at which they were able to establish that excise goods have been held outside a duty suspension scheme. She also saw it as making clear the principle that any challenge to whether HMRC had sufficient evidence that an earlier excise duty point could be established was not for the tribunal to determine as it was a matter of judicial review.

72. Mr Davies submitted that *B&M Retail* did not indicate that HMRC were bound to assess at what they considered to be the first duty point where sufficient evidence existed to make their assessment. He directed us to the Upper Tribunal's reference to the recognition in that case that one or more other excise duty points must have been triggered before B&M received the excise goods. He saw this as support for HMRC having to identify the earliest duty point.

73. With respect to Mr Davies we do not agree with him and we agree with Ms Brown. B&M clearly supports HMRC's policy of assessing against the first duty point it is able to establish and in respect of which it has sufficient evidence. As a principle, it does not matter that there might have been earlier excise duty points if HMRC has concluded that they are unable, on the evidence before them, to make an assessment at those earlier excise duty points. Although it is possible to challenge HMRC's conclusion as to the sufficiency of evidence such a challenge is by way of judicial review rather than a matter for the Tribunal.

74. In any event on the facts of this Appeal, the excise duty point in question is logically the first – as it arises on departure of the Goods from the Appellant's warehouse. We do not see

how there could in fact be an earlier excise duty point against which HMRC should have assessed. Mr Davies point is therefore an academic one.

75. *B&M Retail* also makes it clear that the Appellant's various submissions relating to HMRC's failure to "pursue with adequate vigour" their investigation, must also fail before this Tribunal as such a challenge should be by way of judicial review.

The discretion issue

76. The Appellant also contended that HMRC unfairly exercised its discretion in holding it liable for the unpaid excise duty. Whether this contention is an extension of the submission made in relation to *B&M Retail* or a separate submission was not entirely clear.

77. If the point goes simply to who should be liable for the unpaid excise duty, Ms Brown submits that the liability position is clear under the HMDP Regulations – as Regulation 9(1)(a) provides specifically that in the circumstances of this Appeal, the person liable to pay the duty is the person providing the guarantee. Given that the Appellant clearly indicated on the ECMS documentation that it was providing the guarantee it is the person liable under the Regulation.

78. There is, therefore, no discretion involved.

The Liability Issue

79. The Appellant's grounds of appeal include a reference to "s.5 Ch V point 2 of the 2008 Directive" and what the Appellant sees as HMRC's inadequate consideration of the member state in which the irregularity occurred or the assessable person.

80. Ms Brown interpreted this as a reference to Article 38(2) of the Directive. This provision applies where an irregularity is detected during a movement of excise goods in a member state other than the one in which the goods have been released for consumption. It deals with movements in circumstances outlined in Articles 33(1) and 36(1).

81. The relevance of the provision is not immediately apparent and Mr Davies did not develop it at the hearing. Ms Brown disputed the relevance of the provision, concluding that the Ground was misconceived.

82. Given the Appellant's failure to develop this ground to a position where we could properly consider it we have not done so.

Strict Liability

83. The Appellant contended that applying strict liability in the particular circumstances was unfair and disproportionate.

84. Several of the points made by Mr Davies in his skeleton argument and submissions were related to this ground. They were either indicators of why the Appellant believed it had a reasonable excuse or indications of the Appellant's lack of culpability. These included, non-exhaustively, the fact that HMRC were aware that the Appellant had been party to movements of excise goods without having a movement guarantee in place, the fact that guidance relating to movement guarantees was not clear and its belief that its insurers provided such a guarantee.

85. Ms Brown submitted that this ground of appeal was without merit as the legislation governing the Assessment did not include any provision for reasonable excuse. She accepted that it was of relevance in relation to "wrong-doing" penalties which were not being sought by HMRC and that the Appellant's lack of culpability had therefore been recognised.

86. Ms Brown also submitted that ignorance of the law was not a defence. She cited the HMRC guidance outlining the rules relating to excise goods and duty suspension regime

(Excise Notice 197) which specified in some detail (at paragraph 10.2) the requirements relating to financial security for duty suspended movements.

87. She cited also the following comments of Lord Hoffman in *Greenalls Management Ltd v HMRC* [2005] UKHL 34 which outlined his view of the risks inherent for warehouse keepers and the nature of the strict liability regime:

> "[34] The warehouse keeper can reduce the commercial risk by requiring a bond or guarantee. Whether he does so or is content to run the risk of having to pay the duty without effective recourse is a matter for him. No one is obliged to run an excise warehouse. It is a privilege which carries obligations …
>
> [37] I have no difficulty with the general proposition that large-scale evasion of excise duty on spirits is a very serious problem which may call for draconian procedures and remedies …. The Respondent Greenalls Management Limited is an authorised warehouse keeper, a status which carries heavy responsibilities and, no doubt, commensurate financial advantages …. There is no unfairness or injustice in the notion that it may become liable for large sums of excise duty in circumstances where it is not at fault."

88. We agree with Ms Brown. The excise duty regime is generally a strict liability regime. The fairness and proportionality of a strict liability approach has been considered judicially in cases such as *Martyn Glen Perfect v HMRC* [2019] EWCA Civ 465 and more recently in *Charlene Hughes v HMRC* [2024] UKUT 00108 and found not to offend against the EU principles of fairness and proportionality in the circumstances considered. We consider that the circumstances of this case provide no basis for finding otherwise.

CONCLUSION

89. It is accepted by HMRC that the Appellant has been the victim of fraud. It is also clear that the Appellant carried out due diligence checks in respect of the Customer and acted responsibly. However, notwithstanding those actions, the Appellant did not ensure, as it was required to, that a movement guarantee was in place for the movement of the Goods and that is what has unfortunately led to it being liable.

DISPOSITION

90. The Appeal is dismissed and the Excise Duty Assessment in the sum of £38,626 is upheld

RIGHT TO APPLY FOR PERMISSION TO APPEAL

91. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. 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.

VIMAL TILAKAPALA

TRIBUNAL JUDGE

Release date: 09th DECEMBER 2024