



Neutral Citation: [2024] UKUT 176 (TCC)

Case Number: UT/2019/000009

**UPPER TRIBUNAL**  
**(Tax and Chancery Chamber)**

Rolls Building, London

*EXCISE DUTY – assessment in respect of duty unpaid tobacco – whether FTT erred in relation to whether earlier duty point could be established – yes but error immaterial as insufficient evidence in respect of which identity of person liable to duty could be established - whether FTT erred in concluding Appellant “holding” the tobacco and in failing to give sufficient reasons – no – appeal dismissed*

**Heard on:** 16 April 2024

**Judgment date:** 18 June 2024

**Before**

**JUDGE SWAMI RAGHAVAN**  
**JUDGE MARK BALDWIN**

**Between**

**QAIS MAJEED ALI**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Ali, the Appellant

For the Respondents: Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

## DECISION

### INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal (“FTT”) published as *Qais Majeed Ali v HMRC* [2019] UKFTT 306 (“the FTT Decision”) which dismissed Mr Ali’s appeal against an excise duty assessment for £55,470. HMRC imposed the assessment on him in respect of their seizure on 29 July 2016, in London, of duty unpaid shisha tobacco that was in a van Mr Ali was unloading, and also in the lock up unit he was unloading the tobacco into. Mr Ali’s case was that the van and lock-up were owned by a company, Palm Palace Limited (“Palm Palace”), for which he was employed as a part-time driver and which owned a shisha café. He said he had bought the tobacco on the company’s behalf from suppliers in the UK believing that duty had already been paid on it.

2. The Upper Tribunal subsequently gave Mr Ali permission to appeal in 2019<sup>1</sup> on specified grounds. Those principally concern whether the FTT had erred in law in its treatment of whether 1) HMRC ought to have assessed the supplier Mr Ali said he had bought the tobacco from, and 2) Mr Ali had sufficient control of the tobacco as opposed to Palm Palace so as to be “holding” it within the meaning of the relevant excise duty legislation which HMRC relied on to impose liability on him.

3. We were grateful to Mr Ali for attending to represent himself, as he had done before the FTT, and to the translator appointed by HMCTS without whom Mr Ali’s participation in the hearing would not have been possible. We were also grateful to Mr Davies, counsel who appeared on behalf of HMRC for his clear and concise submissions which facilitated their translation.

### LAW

4. The disputed issues concerning Mr Ali’s liability to the relevant assessment turn on the application of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“the Regulations”) which implement Council Directive 2008/118/EC (“the 2008 Directive”), Regulation 5 provides that there is an excise duty point at the time when goods are released for consumption in the UK.

5. Regulation 6(1) provides so far as relevant:

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

...

(b) 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;

...”

6. As far as the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) is concerned, Regulation 10 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

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<sup>1</sup>The gap in this appeal not being heard until 2024 arose mainly due to a stay of proceedings the Upper Tribunal ordered in 2019 behind the Court of Appeal’s decision in *Davison & Robinson Ltd v HMRC*, however that appeal did not go to hearing but was withdrawn by the appellant and dismissed on 2 March 2023 pursuant to a consent order.

a duty suspension arrangement) is the person holding the excise goods at that time. "

#### CASE-LAW

7. In this section we briefly summarise those case-law propositions relevant to putting Mr Ali's grounds into context. We did not understand there to be any real dispute over the legal principles relevant to whether an assessment ought to have been made on an earlier supplier, and as to what constitutes "holding" (although as will be seen the principles have been progressively clarified over the period from when the FTT heard the case, issued its decision, the Upper Tribunal gave permission and when the appeal was heard before us). Rather the grounds concern whether the FTT Decision misinterpreted and/or misapplied those principles.

#### *Assessment of earlier duty point*

8. In *B & M Retail Limited v HMRC* [2016] UKUT 429 (TCC) the Upper Tribunal held that even though in principle an earlier release for consumption must have occurred, that did not preclude HMRC assessing a person holding excise duty goods in respect of which excise duty had not been paid. The decision as to which of the various persons that had held the goods should be subject to excise duty assessment was at the discretion of HMRC.

9. However, in *Davison & Robinson Limited v HMRC* [2018] UKUT 0437 (TCC) the Upper Tribunal endorsed HMRC's acceptance that HMRC was obliged to assess, as a matter of law and not merely discretion, against "the earliest point in time at which [HMRC] are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement" ([79]). That was consistent with the Upper Tribunal's analysis that the 2008 Directive required an assessment to be made against the first established excise duty point. If HMRC assessed anyone other than the first holder they could identify, it would be open to that person to challenge the assessment on appeal to the FTT ([80]).

10. Earlier (at [67]) the Upper Tribunal had observed that "Clearly, HMRC cannot make an assessment until it has the necessary information on which to establish "when, how, where and by whose acts the excise duty point occurred...".

11. In *Dawson's (Wales) Ltd v HMRC* [2019] UKUT 0296 (TCC) the Upper Tribunal summarised the points which a person would have to show in order to successfully challenge an assessment on the basis that an earlier duty point could be established against which HMRC should have made an assessment (at [149]) (the burden of proof being on the party seeking to challenge the assessment – see [74] and [94] of *Dawson's (Wales) Ltd v HMRC* [2023] EWCA Civ 332):

- (1) Who had physical possession at the time the alleged earlier excise duty point occurred?
- (2) Who is the person alleged to have *de facto* or legal control over the goods who it is said should be assessed rather than the subsequent holder and how that person is said to have such control and the basis on which it was being exercised?
- (3) The time at which the excise duty point arose. (The Upper Tribunal's view was that the date of an invoice was not sufficient in itself without establishing who was in possession of the goods at some identified point or points in time.)
- (4) Where the goods were being held at the relevant time.

12. On appeal, the Court of Appeal endorsed the relevance of all these factors. At [77] it endorsed (1) (physical possession); Asplin LJ considered that was supported by the CJEU's decision in the *Perfect* case and there "the touchstone was the physical possession of the excise

goods”. The Court also endorsed points (3) and (4) (timing and location) (at [94]) and noted that (2) (regarding *de facto* or legal control) was not challenged ([86]).

13. The Court also (at [83]-[84]) considered that the UT in *Dawson’s* had been correct to rely on the passage at [67] in *Davison & Robinson*, regarding HMRC not being able to make an assessment unless it had the necessary information (see [9] above).

#### **Meaning of “holding” in the Regulations?**

14. The case-law in this area was most recently considered by the Upper Tribunal in *Agnieszka Hartleb t/a Hartleb Transport v HMRC* [2024] UKUT 00034 (TCC). In that case the Upper Tribunal agreed with HMRC that the haulage company employer was “holding” the goods in the particular circumstances of her case despite her argument that it was her employee driver who had physical possession of the goods not her.

15. The Upper Tribunal considered (at [78]) the four factors mentioned in *Dawson UT* above regarding establishing an earlier duty point to be a useful guide in determining whom to regard as holder in circumstances where physical possession and *de facto* and/or legal control were separated, as they were on the facts of the case before it.

16. As regards physical possession, the Upper Tribunal explained that was not determinative ([80]) and that a more detailed consideration of the facts was needed ([81]). Referencing the approach taken by the Upper Tribunal in *Dawson’s* (at [143]), the Upper Tribunal in *Hartleb* held that it was consistent with the legislation and case-law to adopt an approach which established first, who had physical possession of the goods, but then considered whether the circumstances of that possession were such that it was inappropriate for that person to be considered to be “holding” the goods ([83]).

17. It is also useful to note that at the time of the FTT hearing in Mr Ali’s case and at the time when the FTT issued its decision, and also when the Upper Tribunal gave Mr Ali permission to appeal, there was an outstanding issue as to extent to which a person’s knowledge that the goods were duty unpaid was relevant. The CJEU’s decision in Case C-279/19 *Commissioners for Her Majesty’s Revenue and Customs v WR* (“WR”) and the Court of Appeal’s application of it in *HMRC v Martyn Perfect* [2022] EWCA Civ 330 has confirmed that it is not. The CJEU concluded (at [36]) 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.”

18. (While that passage was about Article 33 of the 2008 Directive (implemented in the Regulations by Regulation 13) the Court of Appeal in *Dawson’s* confirmed the meaning of “holding” had the same meaning through the directive and this therefore applied to Regulation 6(1)(b).)

19. It is also relevant to note an example discussed in the Advocate General’s opinion regarding a delivery driver who did not know the goods were duty unpaid being held liable given its similarity with Mr Ali’s arguments that he was simply an employee/driver for someone else. In *WR* the taxpayer argued commercial chaos would follow if a delivery driver, who, while they knew or ought to have known the goods were excise goods, did not know they were duty unpaid was still found liable. Rejecting the concern, the Advocate General considered that the undertaking rather than the driver would be liable, contrasting the employed status of the delivery driver in the example with the taxpayer’s status as a self-employed entrepreneur.

The entrepreneurial risks which came with that could be protected through insurance or contractual assignment. The Upper Tribunal in *Hartleb* also referred (at [94]) to this example by way of reinforcement for its view that under the 2008 Directive and Regulations simple physical possession was not the only way in which a person could be found to be holding, and that Ms Hartleb, the employer, not her employee driver, was liable.

#### **FTT DECISION AND BACKGROUND**

20. The FTT received oral evidence from Mr Ali and saw a bank statement produced by him in the name of Palm Palace. It also received evidence from the HMRC officer who attended the seizure and made a visit to the address at which Mr Ali said he bought some of the tobacco together with documentary evidence which included the lock up unit rental agreement, direct debit instructions, and the invoices Mr Ali had provided in relation to some of the tobacco.

21. In its discussion of the issues the FTT made various findings and recorded points of detail in the parties' submissions which we outline as relevant.

22. The weight of the tobacco seized was a matter of dispute, with Mr Ali estimating this was 80-100kg whereas the FTT found the weight was that recorded by HMRC: 515kg (FTT [20]).

23. Mr Ali provided three invoices dated 15 January 2016, 10 March 2016 and 20 May 2016. These detailed the seller as "The Price 30" and the purchaser as "Palm Palace Restaurant".

24. The invoices covered only 185kg out of 515kg. HMRC pointed out: 1) there was no VAT number on the invoices although they purported to charge VAT; 2) the duty on one kilogram of shisha tobacco is £107.71 but the price was £30 per kilogram; 3) two of the invoices had the same sub-total (£2100) but were for different amounts of tobacco (65kg and 70kg).

25. The FTT recorded HMRC's submission that it later visited the location in Queensway Market, London where the tobacco was said to have been purchased establishing that:

"The current business at those premises has been in occupation only since February 2017; the previous occupant is no longer in the UK."

26. The FTT found (FTT [22]) that the duty had not been paid and that the tobacco was released for consumption under Regulation 6(1)(b) at the time of the seizure.

27. As regards physical possession the FTT [27] explained:

"The appellant did not dispute that he had physical possession of the tobacco, both with regard to the tobacco in the unit and in the van. Although the appellant argued in the hearing that he was simply a driver for Palm Palace, he also agreed in the hearing that he was responsible for the lock up unit and van and that he had purchased the tobacco which was stored in the unit, some of which he was transferring to the van at the time of the seizure."

28. In relation to the lock up unit, the FTT had recorded the documentary evidence HMRC had produced as including 1) a storage agreement in the name of the appellant with a move in date of 1 November 2015, 2) an insurance application form, and a "proof of insurance" document in the name of the appellant and 3) a direct debit instruction form with details of a bank account in the name the appellant. (The FTT noted the bank account number and sort code on the form were the same as those on the bank statement produced by the appellant at the hearing which was in the name of Palm Palace). It recorded his submissions (at FTT [5]), which included that the lock up unit was owned by Palm Palace, that Mr Ali was their employee (he had been a director before but had had step down for health reasons), that his work involved visiting a shop in Queensway Market at the request of a Palm Palace director to buy tobacco, and that the van was also owned by Palm Palace and their logo on the side.

29. In relation to whether the appellant was the person holding the tobacco at the relevant time the FTT understood his argument to be that he was acting as an employee of Palm Palace. The FTT noted Mr Ali had not made such argument in his correspondence with HMRC and in his grounds of appeal. It noted his letter to HMRC of 16 August 2017 referred only to himself in relation to the goods and stated: “I purchased the goods and paid all relevant taxes and... have kept copies of all receipts for myself”. The FTT also noted his grounds referred to himself as the purchaser of the tobacco and the person paying for it and had asked for the assessment to be waived so that he could “continue with our business which is our only income”. The FTT noted that Mr Ali had not disputed that he had physical possession of the tobacco and that he had agreed he was responsible for the lock up unit and van and that he had purchased the tobacco (FTT [27]).

30. As regards knowledge (which the FTT considered relevant under the case-law that applied at the time), the FTT found (at FTT [29]) that it was “...clear that the appellant knew that he was in physical possession of [the Tobacco]” and referred to the referral the Court of Appeal had made in *Perfect*. The FTT distinguished that, considering it clear that Mr Ali knew he was in possession of tobacco and that he should have known it was not duty paid. The FTT therefore concluded he was liable to pay the duty when the goods were released for consumption.

31. The FTT found Mr Ali was holding the Tobacco within the meaning of Regulation 10 and was therefore liable to pay the duty ([FTT (30)]).

32. The FTT also considered whether an earlier duty point could be established as follows:

“31. We considered the possibility that there might have been an earlier point in the supply chain of the tobacco which could be established, where a different person might be liable for the duty. The only entity which can be identified earlier in the supply chain from the evidence provided is the trader which provided the three receipts, “The Price 30” in Queensway. That trader is no longer in business.

32. Following the decision in *B & M Retail* ([2016] UKUT 0429 (TC), at §155-157), we consider that it is clear that the fact that earlier excise duty points must have occurred does not preclude HMRC from assessing the appellant to excise duty, as it is unable to assess any person involved in such earlier excise duty points.”

33. Concluding the assessment had been correctly made, the FTT dismissed Mr Ali’s appeal.

#### **GROUND OF APPEAL**

#### **Ground 1 – FTT should have found that an assessment could only be made against The Price 30.**

34. Under this ground, which Judge Richards (as he then was) articulated for Mr Ali, having considered Mr Ali’s grounds on the papers, it is argued that the FTT erred in failing to conclude that an assessment for some or all of the excise duty could only lawfully be made against The Price 30, irrespective of whether HMRC considered that they would be able to recover excise duty from The Price 30. In other words, the FTT ought to have held that the assessment against Mr Ali could not stand because the only lawful assessment that could be made was against The Price 30. It did not matter if HMRC considered they would be unable to recover excise duty from The Price 30. An arguable error of law was said to arise in the light of the fact the FTT had not referred to the Upper Tribunal’s decision in *Davison* and the particular paragraphs we have summarised above (see [8]) (which made the point that HMRC were obliged to assess at the earliest duty point and that, if they had not, an assessment made in relation to a later duty point could be challenged before the FTT).

## ***Discussion***

### *Error of law?*

35. We have already addressed the relevant case-law on prior excise duty points. The authorities consistently refer to the question of whether HMRC can assess excise duty not whether they can recover it. However, by disposing of the prior excise duty point issue by reference to a trader no longer being in business, it would appear, as Mr Ali's ground identifies, that the FTT confused recoverability with the ability to assess and thus erred in law.

36. Mr Davies' first line of response was that the FTT had made no error. HMRC's case had always been that there was no-one to assess, not that there was someone, but that recovery could not be made against them. The FTT, he submits, well understood that. Its reasoning in FTT [32], that HMRC was not precluded from assessing Mr Ali because it was unable to assess any person involved in an earlier duty point, did not *follow from* the FTT's statement in the preceding paragraph that the only trader which could be identified was one that was no longer in business. That statement was simply describing the evidence that was before the FTT, and the two paragraphs were to be read disjunctively.

37. We reject that interpretation. The plain reading of these two paragraphs is that the FTT considered that, for there to be an earlier duty point established that would assist Mr Ali's case, HMRC would have needed to be able to assess the earlier person liable. However, it also considered HMRC would not be able to assess a person who was no longer in business. It is not clear to us why HMRC would be unable (as opposed to unwilling) to assess against a person who was no longer in business. The question whether a person is still in business is different from the question whether a person is still in existence. Putting that to one side, however, what is clear is that the FTT considered that the question whether a person was still in business was relevant to the question whether there was an earlier duty point against which HMRC could assess. We can understand how the FTT might have concluded that the fact that an entity was no longer in business might be relevant in the light of the authorities in this area post *B&M* but prior to *Davison*. In circumstances where it was considered HMRC had a discretion as to whom to pursue, rather than an obligation to pursue the first duty point they could identify, one could see how the FTT might think that the low prospects of recovery when pursuing a trader who was no longer in business would be a relevant factor.

38. However, given the subsequent clarification of HMRC's position in *Davison*, it was an error to assume that considerations relating to recoverability were at all relevant. The correct position is that, if there was someone who HMRC had sufficient information to assess, then HMRC *had to* assess that person irrespective of the prospects of recovery.

39. Accordingly, while the FTT was correct to consider HMRC's ability to assess was key, it erred in considering that an ability to assess depended on whether a trader was still in business. The fact a trader was no longer in business or lacking in resources would not prevent an assessment being made, although it might well affect the prospects of recovery in respect of any such assessment depending on the resources of the company.

40. That error of law arose, in our view, in the light of the FTT's decision not taking account of *Davison* and of the acceptance HMRC gave there (that was noted by the Upper Tribunal) that the question of whether HMRC should pursue a person liable at an earlier duty point was not one of discretion. The FTT cannot however be criticised for that error. *Davison* came out after the hearing had taken place and there is no indication that either party then drew the decision to the FTT's attention.

41. HMRC also argue the FTT's findings did not amount to a finding that "The Price 30" actually existed or that it held tobacco so that it could have been assessed for duty. We agree. The FTT did not make any definitive finding that "The Price 30" was an identifiable person.

Its reasoning was to the effect that, *even if* there was such a person, that would not help Mr Ali because HMRC would not be assessing it because it was no longer in business. (That does not of course detract from there being the error identified in Ground 1 regarding considering recovery rather than ability to assess as the guiding principle.)

*Does the error mean the FTT's decision should be set aside?*

42. Having identified the above error, the question that then arises is whether the error is material so as to warrant setting aside the FTT decision and either remaking it ourselves or remitting it to the FTT. As set out by the Court of Appeal in *Degorce v HMRC* [2017] EWCA Civ 1427 at [95] the tribunal does not need to be persuaded that the error, had it not been made, *would* have led to a different outcome. It is enough, for the error to be considered material, if the decision *might* be different.

43. For the reasons explained below, while we disagree with certain of the points HMRC advance, we ultimately agree with them that the outcome would *not* have been different even if the error the FTT made had been corrected. The error was not therefore material and the FTT decision should not be set aside.

44. HMRC submit that their ability to assess against an earlier duty point is dependent on the availability of evidence to establish “how, when, where and by whose acts the excise duty point occurred” (*Davison* [67]) but that they were unable to establish these matters. They do not accept the invoices were genuine or that the purported seller “The Price 30” existed as a legal entity (because of various discrepancies: VAT was charged but there was no VAT number, the prices were less than duty owed, there was inconsistent adding up). Also, they point to the fact that the invoices only covered 185kg out of 515kg of tobacco and the branding was consistent with a smuggled product.

45. HMRC accept that, whilst the shop at the address (30 Queensway) had a sign saying “The Price”, there was no evidence of a legal entity called “The Price 30” and there was no good evidence that “The Price 30” corresponded to an identifiable earlier tenant. We probed with Mr Davies whether he was right to say the relevant questions (“how, when, where and by whose acts...”) were not answered. Mr Ali’s evidence was to the effect he bought and received tobacco at a specified address, and the invoices he provided specified dates. There was nothing in his account to suggest that whoever he had bought the tobacco from had not themselves been in possession and control of the tobacco when he bought it from them. Also, some of the criticisms HMRC made of the invoices (that the amounts were higher than the duty) went to whether the tobacco was duty unpaid, and whether Mr Ali knew or ought to have known that. Those points were not necessarily inconsistent though with the invoices constituting evidence that Mr Ali had bought the tobacco.

46. In his oral submissions Mr Davies’ reiterated that the fundamental difficulty for Mr Ali was the lack of evidence (in regard to a matter in relation to which he bore the burden of proof) as to *the identity* of the person said to be liable by reference to an earlier duty point. There was no evidence as to who or what “The Price 30” was. Without that, Mr Davies submitted, “The Price 30” was just “a collection of words”. The question of establishing the identity of that person was a necessary precursor to asking whether they had physical possession, and whether they had legal or de facto control.

47. We considered the findings of the FTT and the documentary evidence that was before it which, as well as the invoices Mr Ali showed, included the notebook evidence of the HMRC officer who visited the address where Mr Ali said he had bought the tobacco. We also queried with Mr Davies various issues around HMRC’s view that the person they visited at the address (and who told HMRC the previous occupant had gone away) was not the person who Mr Ali bought the tobacco from. The officer’s notes had indicated that the person they had visited in



2017 had gone on to deny there was tobacco on the premises when asked, yet upon a search immediately after they said that tobacco was then found under the counter. Taking HMRC's account at face value, that raised questions as to the reliability of the evidence from that person around the previous occupant having gone away, although, as Mr Davies fairly pointed out, it is well established that, even if a person had not told the truth in one respect, that did not necessarily mean that all of their account was to be rejected. The HMRC officer had also noted the invoices at the premises looked to be of a different type to the ones Mr Ali had produced. However, given some time had passed between those invoice dates in 2016 and the visit in 2017, that difference in type of invoice did not necessarily mean the receipts had not been given by the occupant HMRC visited.

48. Standing back however, we would agree with Mr Davies' point that, even taking such matters into account, Mr Ali has not produced any evidence which identifies the person who was holding the tobacco according to his account and the invoices he provided. Furthermore, it could not be overlooked that the remainder (and indeed the clear majority) of the tobacco was not accounted for by those invoices, which only covered 185kg of the 515kg seized. Also, those invoices did not necessarily resolve the question of the timing of the duty point (as pointed out by the Upper Tribunal in *Dawsons*, invoices could not be conclusive on timing when one does not know *who* was in possession of goods at time). Even if the invoices were evidence of some kind of transaction having taken place relating to some of the tobacco, they did not resolve the question of the nature of who or what "The Price 30" was and so the identity of a person who was liable by reference to an earlier duty point.

49. We have also considered whether this is the sort of error of law where, if the FTT had been aware of the correct position following *Davison*, it would have approached its fact-finding differently. But, even under the law as understood at the time under *B&M*, if Mr Ali had wanted to argue that he should not be liable because HMRC could have pursued someone else who was liable prior to him, then it was for him to identify that someone. *Davison* just confirmed, in the light of the acceptance HMRC gave, that HMRC *had to* then go after that person; they could not pick and choose between that person and a later holder. This only serves to reinforce our view that, although we have identified an error of law, it is not a case where the FTT decision should be set aside. We are satisfied that, even if the error were corrected and the FTT had considered only whether an identified person could be assessed rather than taking into account the recoverability of any assessment against such person, it would *have to* reach the conclusion that HMRC were unable to assess anyone else. This is because Mr Ali had not produced any (let alone sufficient) evidence to identify anyone else who might be liable, and (as *Dawson's* makes clear) a person who asserts that there is an earlier duty point HMRC can assess must be able to identify the person it is said HMRC can assess.

50. Having considered the FTT's findings and the evidence before it, we cannot see that there is anything which suggests Mr Ali could have shown the FTT that HMRC had evidence which would have allowed them to identify an earlier person who should be assessed. While Mr Ali showed a picture on his phone taken from an internet search of a shop fascia showing "The Price 30" and it is not in dispute that there was or may still be such a fascia at the address HMRC visited, this does not address the difficulty of establishing the identity of the particular person whom HMRC could have assessed instead of Mr Ali.

51. In conclusion, although we have identified an error of law, we come to the view that it is immaterial and does not warrant setting the FTT decision aside.

**Ground 2 – Palm Palace Limited, not Mr Ali, had sufficient control in order to be “holding” for the purposes of Regulation 10(1) of the Regulations.**

52. Permission on this ground was granted on 19 December 2019 following an oral renewal of permission hearing. The legal landscape at that point was one where the Upper Tribunal in *Dawson’s* had issued its decision (4 October 2019) but the CJEU had not yet issued its decision in *WR*. The Upper Tribunal’s decision in *Dawson’s* revolved around the issue of whether control involved physical possession, as HMRC argued, or included de jure or de facto control over the goods (even if the person did not have physical possession) as the taxpayer there argued (to advance their case that HMRC should have assessed a person at an earlier duty point). Pending the CJEU’s decision in *WR*, the Upper Tribunal in *Dawson’s* proceeded on the basis of various propositions at [131] (derived from various other authorities before it), which included that an innocent agent of the person with legal or de facto control was not holding but that actual or constructive knowledge of physical possession of duty unpaid excise goods could take someone out of the status of an innocent agent. The Upper Tribunal went on to note that, while none of the authorities had covered the situation where physical possession had not been established, they did require, when seeking to establish that a person without physical possession of goods could be regarded as their holder, establishment of the basis on which it was said that legal or de facto control of the goods was said to arise (at [136]). Thus, the issue of whether there was sufficient control in order to be “holding” had been highlighted as a key factor.

53. The Upper Tribunal’s analysis in *Hartleb* above, and its suggestion that the factors explored in *Dawson’s* relevant to establishing whether someone was liable at an earlier duty point (which included control) were also useful to consider when examining whether someone was “holding” (see [15]), show how the issue of control is one of a number of factors that fall to be considered when looking at whether it is inappropriate to consider someone with physical possession as “holding”.

54. It is in that context that the FTT’s consideration of sufficiency of control must be assessed. When the factors in *Dawson’s* are worked through in relation to the facts found and the evidence before the FTT, we are unable to detect any error of law. Mr Ali did not contest that he had physical possession either in relation to the tobacco in the van or the unit (FTT [27]). Physical possession is not of course determinative, but the FTT did not consider that it was.

55. As regards sufficiency of control it is plain that the FTT rejected Mr Ali’s case that he was simply an employee driver for Palm Palace. The storage unit and the direct debit which paid for it was in his name. He had bought and paid for the goods, and he had not, up until the hearing, put his case in a way that suggested he was acting on behalf of Palm Palace as its employee. (The further *Dawson’s* questions do not, as HMRC rightly accept, throw light on the question of who was “holding” as between Palm Palace and Mr Ali, as the timing and location were the same as between the two).

56. It was thus clear 1) that Mr Ali had physical possession of the goods and 2) that there was nothing in the further factual circumstances of the case which the FTT considered to suggest that it was inappropriate to find that he was holding the goods. Those factual circumstances (his rental and his insurance of the storage unit and that he bought and paid for the goods) also distinguish him from the hypothetical delivery driver in the example addressed by the Advocate General in *WR* and mentioned by the Upper Tribunal in *Hartleb* (see [19]) in that they point to an assumption of some level of “entrepreneurial risk”.

57. At the hearing before us Mr Ali said that he could not understand why the rental agreement was in his name and pointed to the bank statements in Palm Palace’s name with the

same account number as that which appeared next to his name on the direct debit. Those were however both matters which the FTT mentioned in its decision (at FTT [5(6)] and FTT [9(3)]). Neither would have necessarily meant, when considered with the totality of the evidence, that the FTT ought to have concluded that Palm Palace as opposed to Mr Ali had sufficient control.

58. We accordingly conclude there was no error of law in the FTT failing to find that Palm Palace, as opposed to Mr Ali, had sufficient control in order to be “holding” for the purposes of Regulation 10. We therefore do not need to address HMRC’s alternative arguments, that there could be more than one person who was a “holder” at any one time or that a person could be liable by virtue of being a person “involved in the holding” under the provision for joint and several liability under paragraph 2 of Regulation 10.

**Ground 3 – the FTT failed to give sufficient reasons for the conclusion that Mr Ali was “holding” tobacco for Regulation 10(1) purposes**

59. Under this ground it is argued that the FTT erred in law by failing to give sufficient reasons for its conclusion that Mr Ali was “holding” the tobacco for Regulation 10(1) purposes. As explained by the Court of Appeal’s comments on the duty to give reasons in *Flannery v Halifax Estate Agencies* [1999] EWCA Civ 811 (p 381), reasons should be such that a losing party can understand why they have lost (especially because without reasons they will not know whether the court or tribunal misdirected itself and whether they have an available appeal on the substance of the case).

60. We have already set out much of the content of the FTT’s reasoning for why it rejected Mr Ali’s case that he was simply an employee/driver of Palm Palace and could not be “holding” the tobacco (and which appeared in FTT [24] to [30]). The main issue is whether the FTT’s reasoning was sufficient to enable Mr Ali to understand why the FTT considered he was “holding” the tobacco for Regulation 10(1) purposes. We agree with HMRC that it was. Mr Ali’s case was to the effect that he was not “holding” because he was simply an employee/driver of Palm Palace. The FTT addressed that case with sufficient reasons by explaining that Mr Ali was holding because he did not contest that he had physical possession of the goods, he was responsible for the lock up unit and van, he bought and paid for the goods and because of the contrast with the way he had put his case previously.

**CONCLUSION**

61. For the reasons above, Mr Ali’s appeal is dismissed.

**JUDGE SWAMI RAGHAVAN  
JUDGE MARK BALDWIN**

**Release date: 18 June 2024**