[2013] UKUT 0564 (TCC)

Appeal number: FTC/64/2012

EXCISE DUTY – disappearance of goods – excise duty point – tax warehouse – assessment on consignor – validity of assessment – abnormal and unforeseeable circumstances – force majeure – whether supervening principles of European Law of proportionality and/or legal certainty rendered assessments invalid – Council Directive 92/12/EEC, Arts 13, 14, 15 and 20 – validity of Regulation 7 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

BUTLERS SHIP STORES LIMITED

Appellant

v.

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: LORD GLENNIE

Sitting in public at George House, 126 George Street, Edinburgh on 11 September 2013

Mr Julian Ghosh QC, Mr Philip Simpson, advocate, and Mr Jonathan Bremner, counsel, instructed by Burness Paull LLP, solicitors, Edinburgh, for the Appellant (Butlers Ship Stores Limited)

Mrs Delibegovic-Broome, advocate, instructed by the Office of the Advocate General for Scotland, for the Respondents (HMRC)

DECISION

LORD GLENNIE

Introduction

[1] This appeal concerns the validity of assessments to excise duty made against the appellant ("Butlers") following the disappearance of consignments of whisky and vodka. It involves a consideration of EU law and UK secondary legislation and the application thereto of the principles of proportionality and legal certainty.

Outline facts

[2] The detailed facts giving rise to this dispute are set out in the Decision of the FTT and it is not necessary to repeat them at any length here. A brief summary is given in the following paragraphs. Save in respect of one finding, the facts are not in dispute. Nor could they be at this stage, since the appeal is limited to issues of law.

[3] Butlers operates a "tax warehouse" (sometimes known colloquially as a "bonded warehouse"). It is an "authorised warehousekeeper" for the purpose of the relevant excise duty legislation (both EU and domestic). It receives into the warehouse and stores therein a variety of goods, including alcoholic drinks, in bond, under "duty suspension" arrangements. Under such arrangements, goods may be kept in a tax warehouse, or moved from one tax warehouse to another (including to another tax warehouse in a different country within the EU), without excise duty becoming chargeable. Excise duty becomes chargeable on such goods when they are "released for consumption". In terms of the relevant legislation, however, the expression "released for consumption" has a wide meaning. Goods are "released for consumption" whenever they are removed from the duty suspension arrangement, whether by the owner, warehousekeeper or consignor or otherwise, and whether pursuant to some *bona fide* instruction or by fraud or theft (referred to in the legislation as an "irregular departure" from the suspension arrangement).

[4] This case concerns the removal from the suspension arrangement of six consignments of whisky and vodka warehoused by Butlers and despatched by them at the request of the owner to tax warehouses in Spain and Estonia. All the relevant documentation was in order and appeared to show that the consignments had been received at their intended destinations. Some time later it was discovered that the consignments had not arrived at their intended destinations. Their whereabouts remains unknown. Their non-arrival was due to the fraud of the owner of the goods, and the actings of the haulier and possibly persons unknown. Butlers were unaware of and did not participate in the irregularity in any way.

[5] The FTT made the following finding about Butlers' conduct at paragraph 132 of its decision:

> "Butlers did all that could reasonably be expected of them. Whether one describes this conclusion as all due commercial care having been taken, or all the due diligence of a circumspect warehousekeeper, does not matter. They are all different ways of expressing the same notion, namely that Butlers acted properly, carefully, reasonably and in good faith throughout."

That finding was challenged by HMRC, though refreshingly without any marked enthusiasm, on the ground that it represented a view of the facts that could not reasonably be entertained: *Edwards* v *Bairstow* [1956] AC 14. It was said that there was evidence that Butlers did not themselves arrange for the transportation of the goods and, further, the overall movement of the goods did not make commercial sense. Fraud was a foreseeable risk inherent in the business and Butlers were on notice that warehousekeepers would be held liable if goods went missing in transit. I reject that challenge. I was not taken to the evidence in any detail, but findings of fact are for the FTT and it is clear that there was evidence upon which they could properly make those findings.

[6] In the case of each consignment, the fraud has resulted in an irregular departure from the suspension arrangement. Excise duty thereupon became chargeable. According to the legislation, in those circumstances the excise duty "point" is the date when the goods were removed from Butlers' tax warehouse; and the person liable to pay the duty (in the absence of agreement that someone else will pay it) is the person named as consignor in the "accompanying administrative document", sometimes called the "administrative accompanying document" ("the AAD"), the official document used for the movement of duty suspended goods. The consignor shown on each of the AADs was Butlers.

[7] Butlers' case on these facts is straightforward. They say that it is simply unfair that they, an innocent party, should be made liable for the whole of the excise duty payable on the goods. The tax warehousekeeper is not the person primarily liable for the duty. The primary obligation to pay the duty is placed on the vendor of the goods. Imposing a liability on the warehousekeeper fulfils no fiscal or economic purpose. It is simply a means of ensuring that the tax is paid. To make an innocent third party, such as the warehousekeeper, liable for the whole duty without it being established that he is at fault in any way – and, indeed, when it is established that he is not at fault in any way – is a disproportionate response to the need to ensure that the duty chargeable on the goods is paid. It infringes the principle of proportionality. It also infringes the principle of legal certainty, since if liability to pay the duty is triggered by acts of a third party over whom the warehousekeeper has no control and of whose existence he may be entirely ignorant, the warehousekeeper cannot predict with any degree of confidence what will be the legal outcome of his actions; and he cannot in any effective way temper his actions so as to avoid the risk of liability. The main thrust of their attack is directed at the UK Regulations. While on a sympathetic construction, they might not render the warehousekeeper liable, more realistically (as Mr Ghosh QC on their behalf candidly accepted), they do make the warehousekeeper liable, but in so doing they infringe the principles of proportionality and legal certainty and go further than is required by the EU Directive to which they purport to give effect. In the alternative, however, they say that if the Directive itself requires the warehousekeeper to be held liable in such circumstances, and the UK Regulations do no more than is required to comply with the Directive, then the Directive too does not comply with the relevant principles of EU law and should be declared to be invalid; though they recognise that this would require a reference to the European Court of Justice.

The legal framework

[8] In considering these matters, it is necessary to look in some detail at the legislative framework at both the EU and UK levels and to consider their interrelationship. That framework is contained principally in two documents, namely Council Directive 92/12/EC and The Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 (2001 No. 3022), though certain other Regulations require to be noted.

Council Directive 92/12/EC

[9] Council Directive 92/12/EC as amended from time to time ("the 1992 Directive") begins, in the usual way, with a number of recitals, of which the following are of some relevance:

> "THE COUNCIL OF THE EUROPEAN COMMUNITIES
>
> Having regard to the Treaty establishing the European Economic Community, and in particular Article 99 thereof, …
>
> Whereas the establishment and functioning of the internal market require the free movement of goods, including those subject to excise duties; …
>
> Whereas, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States; …
>
> Whereas in order to ensure that the tax debt is eventually collected it should be possible for checks to be carried out in production and storage facilities; whereas a system of warehouses, subject to authorisation by the competent authorities, should make it possible to carry out such checks;
>
> Whereas movement from the territory of one Member State to that of another may not give rise to checks liable to impede free movement within the Community; whereas for the purposes of chargeability it is nevertheless necessary to know of the movements of products subject to excise duty; whereas provision should therefore be made for an accompanying document for such products;
>
> Whereas the requirements to be complied with by authorised warehousekeepers and traders without authorised warehousekeeper status should be laid down;
>
> Whereas provision should be made, to ensure the collection of taxes at the rates laid down by Member States, for the establishment of a procedure for the movement of such goods under duty suspension; …
>
> Whereas in the context of national provisions, excise duties should, in the event of an offence or irregularity, be collected in principle by the Member State on whose territory the offence or irregularity has been committed, or by

> the Member State where the offence or irregularity was ascertained, or, in the event of non-presentation in the Member State of destination, by the Member State of departure; …
>
> HAS ADOPTED THIS DIRECTIVE: …"

The importance of these recitals is that they show that the Directive is concerned with the effective functioning of the single market and, to this end, both the need for uniformity of provisions concerning the imposition of excise duty on chargeable goods and the requirement that excise duty considerations should not interfere with the free movement of chargeable goods within the EU. To this end, the Directive seeks to establish a procedure for the movement between member states of chargeable goods "under duty suspension". This inevitably involves some consideration to be given to the best means of ensuring, consistent with such movement, the eventual collection of the tax debt in the appropriate member state.

[10] Title 1 contains a number of General Provisions. Article 1 identifies the scope of the Directive in the following terms:

> "Article 1
>
> 1. This Directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community. …"

The Article goes on in paragraph 2 to make it clear that the particular provisions relating to the structures and rates of duty on products subject to excise duty are to be set out in specific Directives. I am not concerned here with those particular provisions and rates of duty. I can omit Article 2. Article 3 provides that the Directive applies at Community level to certain defined products including alcohol and alcoholic beverages (the others being mineral oils and manufactured tobacco). Member States have the right to introduce or maintain taxes on other products "provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States."

[11] Article 4 contains a number of definitions which are important for an understanding of the substantive provisions of the Directive. These include the following:

> "(a) **authorised warehousekeeper**: a natural or legal person authorised by the competent authorities of a Member State to produce, process, hold, receive and dispatch products subject to excise duty in the course of his business, excise duty being suspended under tax-warehousing arrangement;
>
> (b) **tax warehouse**: a place where goods subject to excise duty are produced, processed, held, received or dispatched under duty-suspension arrangements

by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located;

(c) **suspension arrangement**: a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended; …"

There are also definitions of registered and non-registered trader, but I do not need to set these out here.

[12] The substantive charging provisions begin at Article 5. This provides that the relevant products (alcohol and alcoholic beverages, mineral oils and manufactured tobacco) become subject to excise duty at the time (a) of their production within the EU or (b) of their importation into the EU. However, goods imported into the EU may be placed on entry into the EU under a Community customs procedure in which excise duty is suspended, in which case importation is deemed to take place and the goods become subject to duty when they leave the Community customs procedure.

[13] Of more direct importance for present purposes is Article 6, which provides, so far as material, as follows:

"Article 6

1. Excise duty shall become chargeable at the time of release for consumption …

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement; …

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. …"

This case is concerned with 1(a), a departure from a suspension arrangement. The goods left Butlers' tax warehouse consigned to another tax warehouse (in Spain or Estonia) but did not arrive. They were stolen. That constitutes an "irregular departure … from a suspension arrangement". Excise duty became chargeable at the time of release for consumption.

[14] Article 10.1 provides that products subject to excise duty purchased by persons who are not authorised warehousekeepers (or registered or non-registered traders) and dispatched or transported directly or indirectly by the vendor or on his behalf shall be liable to excise duty in the Member State of destination. Article 10.3 provides that duty is chargeable to the vendor at the time of delivery; though the Member State is allowed to make provision for the duty to be payable by a tax representative other than the consignee. However, the vendor is required to guarantee

payment of the duty, and the Member State in which he is established must ensure that he does so.

[15] Title II is entitled "Production, Processing and Holding". It contains detailed provisions concerning tax warehouses and warehousekeepers. I should set out the relevant parts of Articles 11 to 14:

> "Article 11
>
> 1. Each Member State shall determine its rules concerning the production, processing and holding of products subject to excise duty, subject to the provisions of this Directive.
>
> 2. Production, processing and holding of products subject to excise duty, where the latter has not been paid, shall take place in a tax warehouse.
>
> Article 12
>
> The opening and operation of tax warehouses shall be subject to authorisation from the competent authorities of the Member States.
>
> Article 13
>
> An authorised warehousekeeper shall be required to:
>
> (a) provide a guarantee, if necessary, to cover production, processing and holding and a compulsory guarantee to cover movement, subject to Article 15(3), the conditions for which shall be set by the competent authorities of the Member State in which the tax warehouse is authorised;
>
> (b) comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated;
>
> (c) keep, for each warehouse, accounts of stock and product movements;
>
> (d) produce the products whenever so required;
>
> (e) consent to all monitoring and stock checks.
>
> The requirements must respect the principle of non-discrimination between national and intra-Community transactions.
>
> Article 14

1. Authorised warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or force majeure and established by the authorised of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. …

3. Without prejudice to Article 20, the duty on shortages other than the losses referred to in paragraph 1 and losses for which the exemptions referred to in paragraph 1 are not granted shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses [occurred]"

[16] Title III deals with "Movement of Goods". This, too, is key to the issue of the warehousekeeper's liability in the event of an irregular departure from an excise duty suspension arrangement. The relevant Articles are Articles 15, 18 and 20. I set out the material parts below:

"Article 15

1. Without prejudice to Articles 5 (2), 16, 19 (4) and 23(1a), the movement of products subject to excise duty under suspension arrangements shall take place between tax warehouses. …

2. Warehousekeepers authorised by the competent authorities of a Member State in accordance with Article 13 shall be deemed to be authorised for both national and intra-Community movement.

3. The risks inherent in intra-Community movement shall be covered by the guarantee provided by the authorised warehousekeeper of dispatch, as provided for in Article 13, or, if need be, by a guarantee jointly and severally binding on both the consignor and the transporter. The competent authorities in the Member States may permit the transporter or the owner of the products to provide a guarantee in place of that provided by the authorised warehousekeeper of dispatch. If appropriate, Member States may require the consignee to provide a guarantee. …

The detailed rules for the guarantee shall be laid down by the Member States. The guarantee shall be valid throughout the Community.

4. Without prejudice to the provision of Article 20, the liability of the authorised warehousekeeper of dispatch … may only be discharged by proof that the consignee has taken delivery of the products …

Article 18

1. … all products subject to excise duty moving under duty-suspension arrangements between Member States … shall be accompanied by a document drawn up by the consignor. This document may be either an administrative

document [i.e. an AAD] or a commercial document. The form and content of this document, and the procedure to be followed where its use is objectively inappropriate, shall be established in accordance with the procedure laid down in Article 24.

Article 20

1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3), without prejudice to the bringing of criminal proceedings. …

2. When, in the course of movement, an offence or irregularity has been detected without it being possible to determine where it was committed, it shall be deemed to have been committed in the Member State where it was detected.

3. Without prejudice to the provision of Article 6(2), when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties at the rate in force on the date when the products were dispatched unless …"

[17] It is convenient here to summarise some of the points in the 1992 Directive relevant to the issues in this case.

(1) The primary liability to pay excise duty lies with the vendor: see Article 10. That liability arises at the time of delivery into the member state of destination.

(2) Goods which are subject to excise duty may be held and transported under duty suspension arrangements; excise duty is not chargeable on such goods while they are held or transported under such arrangements.

(3) Goods held under duty suspension arrangements must be held in authorised tax warehouses: see Article 11. If they are moved within a member state or between member states, the movement must take place between tax warehouses: see Article 15.1.

(4) Excise duty becomes chargeable when and where the goods are released for consumption: see Article 6.1. Release for consumption means any departure, including irregular departure, from a suspension arrangement. It includes the case where the goods have been lost or stolen, either from the tax warehouse or in transit between tax warehouses. In such a case, where it is not possible to determine where the offence or irregularity was committed, it is deemed to have been committed in the member state of departure: see Article 20.3.

The member state of departure is required to collect the excise duties at the rate in force on the date when the goods were dispatched.

(5) It is recognised that some losses may occur while goods are held in tax warehouses, or are in transit between tax warehouses, under duty suspension arrangements. The warehousekeeper is not held to account (he "shall be exempt from duty") for losses attributable to fortuitous events or force majeure, or in respect of losses inherent in the nature of the products during production, processing, storage and transport: see Article 14.1.

(6) However, duty has to be paid on all other shortages and losses: see Article 14.3.

(7) Article 20.1 provides that the duty is payable by the person who guaranteed payment of the excise duties in accordance with Article 15.3. As appears from sub-paragraphs (8) and (9) below, that person is likely to be the warehousekeeper. It will be the warehousekeeper unless someone else (the transporter or owner of the goods) has provided that guarantee in his place (see below).

(8) The authorised warehousekeeper is required to provide a guarantee "if necessary" to cover production, processing and holding of duty suspended goods: Article 13(a). He is required to provide "a compulsory guarantee" to cover movement of the goods: *ibid*. That guarantee is to cover "the risks inherent in intra-Community movement": Article 15.3. I take that expression to include the risk of loss (by theft or otherwise), though not the risks for which the warehousekeeper is not liable under Article 14.1.

(9) However, the competent authorities in the relevant member state may permit the transporter or owner of the goods to provide a guarantee in place of that provided by the authorised warehousekeeper of dispatch: Article 15.3. But, as the wording makes clear, neither the transporter or owner of the goods can be compelled to provide such a guarantee in place of that to be provided by the warehousekeeper – the competent authorities may permit that to happen if, presumably, it can be agreed and arranged between the warehousekeeper on the one hand and the transporter or owner of the goods on the other.

(10) The liability of the warehousekeeper (or, in the appropriate case, the transporter or owner of the goods), "may only be discharged by proof that the consignee has taken delivery": Article 15.4.

[18] Put short, while the duty is chargeable to the vendor of the goods, a system has been established whereby, to facilitate the holding, movement and storage of goods before excise duty has been paid, goods may be held under duty suspension arrangements in authorised tax warehouses and may be shipped from one tax warehouse to another, including to a tax warehouse in another country within the EU. This gives rise, perhaps inevitably, to the risk that taxable goods will be lost or stolen before excise duty is ever paid on them. In those circumstances it has been thought appropriate to make the warehousekeeper liable for the unpaid excise duty which would have been paid on the goods had they not been lost or stolen, and to require the warehousekeeper to put up a guarantee against such liability. The warehousekeeper

can only be relieved of his liability if, by agreement of the competent authorities in the member state, the transporter or owner of the goods provides a guarantee in his place. But the authorities of a member state are given no power to insist that the transporter or owner of the goods provides a guarantee in place of the warehousekeeper.

The Alcoholic Liquor Duties Act 1979

[19] I simply note here that excise duty is chargeable in the UK by virtue of section 5 of the Alcoholic Liquor Duties Act 1979.

The Excise Goods (Holding, Movement, Warehousing and Reds) Regulations 1992

[20] The Excise Goods (Holding, Movement, Warehousing and Reds) Regulations 1992 ("the 1992 Regulations"), made under the Customs and Excise Management Act 1979 ("the 1979 Act"), give effect to some aspects of the 1992 Directive. In particular, they contain detailed provision concerning movement of duty suspended goods and the use of an AAD. In the Interpretation part, there is a definition of "accompanying document" which makes it clear that it is the AAD referred to in Article 18(1) of the 1992 Directive. Regulation 4 identifies the excise duty point, i.e. the point in time when excise duty becomes chargeable. Regulation 4(2)(a) states that if any duty suspension arrangements apply to any excise goods, the excise duty point will be, in effect, the time when the goods are delivered from a tax warehouse or are otherwise made available for consumption. In terms of the 1992 Directive, that expression includes goods being subject to any departure, including an irregular departure, from a suspension arrangement. Regulation 5 makes it clear that the person liable to pay the duty in the case of the importation of excise goods from another member state shall be the importer of the goods, the authorised warehousekeeper acting on behalf of an importer of the goods being jointly and severally liable with him. However, in terms of Regulation 5(4), in the circumstances covered by Regulation 4(2)(a) the person liable to pay the duty is the authorised warehousekeeper. Regulation 9 provides that, subject to Regulations 10 and 11, Community excise goods may be moved in duty suspension from a tax warehouse to any other tax warehouse. Regulation 10 provides that a consignment of excise goods may not be moved under duty suspension arrangements unless *inter alia* the duty chargeable on the goods is secured by a guarantee and the goods are accompanied by an AAD issued by the consignor. That Regulation does not state who is to provide the guarantee in respect of the duty chargeable on the goods; but the AAD which I was shown (which may or may not have been in the same terms as was used in 1992/3) clearly contemplates that it is the consignor who issues the AAD who also provides the guarantee. Regulation 11 deals with the AAD itself. It provides that a person who consigns excise goods from the UK in the circumstances specified in paragraph (2) to an address in another member state shall *inter alia* issue an AAD. Paragraph (2) provides that in the case of goods being consigned under duty suspension arrangements, that person is the authorised warehousekeeper who consigns those goods. In the case of goods being consigned under duty suspension arrangements, there is no provision for anyone other than the warehousekeeper to issue the AAD. This is important, because in its original form, which was the form current at the date the 1992 Regulations were introduced (10 December 1992, with

commencement date of 1 January 1993), the 1992 Directive itself contemplated that the guarantee will be given by the warehousekeeper (see Article 15.3) and that in the case of irregularity in the course of a movement, the excise duty would be due from the person guaranteeing payment (Article 20).

The Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001

[21] In the UK, Article 20 of the 1992 Excise Directive is currently implemented by the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 (2001 No. 3022) ("the 2001 Regulations"), also made under the 1979 Act. They provide for the creation of excise duty points and the identification of the person liable to pay the duty where an irregularity occurs during the course of an intra-EU movement of duty suspended excise goods. So far as is relevant, the 2001 Regulations provide as follows.

Part I – Preliminary

Interpretation

2. In these Regulations —

'accompanying administrative document' means …

'authorised warehousekeeper' has the same meaning as in Article 4(a) of the Directive;

'the Directive' means Council Directive 92/12/EEC of 25 February 1992;

'duty suspended movement' means
(a) a movement of excise goods which:
(1) starts at a tax warehouse in one member State and is intended to finish by the arrival of those goods with either:
(i) the authorised warehousekeeper at a tax warehouse or a registered or non-registered trader in another member State; or
(ii) the authorised warehousekeeper at a tax warehouse in the same member State having passed through at least one other member State during the course of the movement; and
(2) in respect of which the excise duty to which those goods are subject by virtue of Article 5 of the Directive is suspended pursuant to suspension arrangements as defined in Article 4(c) of the Directive; and …

'excise duty' means …

'guarantee' means the guarantee provided in accordance with the provisions of Article 15(3) of the Directive;

'irregularity' means an irregularity or offence within the meaning of Article 20 of the Directive …

'tax warehouse' has the same meaning as in Article 4(b) of the Directive.

Part II – Excise Duty Points

Irregularity occurring or detected in the United Kingdom

3.—(1) This regulation applies where:

(a) excise goods are:

(i) subject to a duty suspended movement that started in the United Kingdom; or

(ii) imported into the United Kingdom during a duty suspended movement; and

(b) in relation to those goods and that movement, there is an irregularity which occurs or is detected in the United Kingdom.

(2) Where the Commissioners are satisfied that the irregularity occurred in the United Kingdom, the excise duty point shall be the time of the occurrence of the irregularity or, where it is not possible to establish when the irregularity occurred, the time when the irregularity first comes to the attention of the Commissioners.

(3) Where it is not possible to establish in which member State the irregularity occurred, the excise duty point shall be the time of the detection of the irregularity or, where it is not possible to establish when the irregularity was detected, the time when the irregularity first comes to the attention of the Commissioners.

(4) For the purposes of this regulation, detection has the same meaning as in Article 20(2) of the Directive.

Failure of excise goods to arrive at their destination

4.—(1) This regulation applies where:

(a) there is a duty suspended movement that started in the United Kingdom; and

(b) within four months of the date of removal, the duty suspended movement is not discharged by the arrival of the excise goods at their destination; and

(c) there is no excise duty point as prescribed by regulation 3 above; and

(d) there has been an irregularity.

(2) Where this regulation applies and subject to paragraph (3) below, the excise duty point shall be the time when the goods were removed from the tax warehouse in the United Kingdom. …

Part IV – Payment of Excise Duty

Payment

7.—(1) Subject to paragraph (2) below, where there is an excise duty point as prescribed by regulation 3 or 4 above, the person liable to pay the excise duty on the occurrence of that excise duty point shall be the person shown as the consignor on the accompanying administrative document or, if someone other than the consignor is shown in Box 10 of that document as having arranged for the guarantee, that other person.

(2) Any other person who causes or has caused the occurrence of an excise duty point as prescribed by regulation 3 or 4 above, shall be jointly and severally liable to pay the duty with the person specified in paragraph (1) above.

In the Explanatory Notes (which, of course, are not part of the Regulations) it is explained that Regulation 7 (above) identifies the persons liable to pay at the duty points specified in regulations 3 and 4. These are the consignor and (jointly and severally) any other person who caused the occurrence of the excise duty point. However, the consignor's liability is transferred to the person who provided the movement guarantee where the guarantee is supplied by someone other than the consignor.

[22] As appears from the 2002 Regulations to which I refer in para.[23] below, the reference to the consignor being liable to pay the duty in the case of an irregularity in a duty suspended movement is, in effect, a reference to the warehousekeeper.

The Excise Goods (Accompanying Documents) Regulations 2002

[23] The Excise Goods (Accompanying Documents) Regulations 2002 ("the 2002 Regulations"), also made under the 1979 Act, deal with AADs. Regulation 5 provides that excise goods entered for removal from an excise warehouse for exportation to another member state must not be removed from that warehouse unless (a) the authorised warehousekeeper "is the consignor for the purpose of complying with the Community provisions concerning accompanying administrative documents [i.e. AADs]" and (b) either he or a person authorised by him to act on his behalf ensure that Community provisions are complied with when the AAD is completed.

[24] The effect of these various Regulations, for present purposes, is that they make it clear that the warehousekeeper is the consignor for the purposes of the AAD. In terms of Regulation 7, therefore, the warehousekeeper, as consignor, is the person liable to pay the excise duty in circumstances where the goods are lost or stolen in transit, unless he has procured that someone else agrees to arrange the guarantee and is shown in Box 10 of the AAD as having arranged for the guarantee. The position is, therefore, the same as under the 1992 Directive.

Documentation

[25] In the course of the hearing I was shown HM Customs and Excise Notice 197 entitled "Excise goods: holding and movement" issued in May 2004. The Notice explains the U.K.'s requirements for the holding and movement of excise goods in duty suspension within the UK and the EU. Amongst other things, it purports to clarify the position regarding the receipt of goods into warehouses and the liability for losses and irregularities in transit. In section 8 it explains that two types of security are required, namely: premises security and movement security. Premises security is the responsibility of authorised warehousekeepers. Movement security is required from either the authorised warehousekeeper, the last owner of the goods whilst warehoused or the transporter. It is explained that the liability of the principal may be significantly greater than the size of the security guarantee put up by him. That principal can be assessed for all outstanding duty arising from any irregularities in the warehouse or during any movements for which he has provided the guarantee. The question of financial security for duty-suspended movements is set out more fully in section 12 of the Notice. In paragraph 12.1 it is stated that all duty-suspended movements from an excise warehouse must be covered by financial security. Paragraph 12.2 states that the authorised warehousekeeper must ensure that such financial security is in place prior to removal of the goods from the warehouse. Paragraph 12.3 states that the movement security may be provided by the warehousekeeper or the last owner of the goods whilst warehoused or transported, but that if the security is provided by the owner or the transporter, "the warehousekeeper must hold written confirmation from the principal confirming that the warehousekeeper may use their guarantee".

[26] I was also shown a pro forma AAD for goods moving between member states of the EU. This pro forma AAD is set out towards the end of Notice 197 (see above). It is a fairly simple document naming the consignor and consignee and their respective excise details, the transporter and transport details, the country of dispatch and of destination, the place of delivery and other such details. Butlers were named in the AAD as consignor. Box 10 is headed "Guarantee". The Explanatory Notes on the form explain that the party completing the form is to "identify the party or parties responsible for arranging the guarantee." It goes on to say that only "consignor", "transporter" or "consignee" need be entered, as appropriate. As the FTT notes in paragraph 13 of its decision, there was no other such person shown in box 10, which was left empty. Accordingly Butlers, as consignor, were liable in terms of Regulation 7(1) to pay the excise duty on the occurrence of the excise duty point.

Discussion

[27] I have summarised the main submissions for Butlers in paragraph [7] above. I turn now to consider those submissions, and HMRC's response, in more detail.

[28] For convenience, I deal first with two arguments concerning the Regulations and their relationship to the 1992 Directive. The first argument is that, on a sympathetic construction, the Regulations do not impose liability on Butlers, as warehousekeeper, for the full duty on the goods. The second argument is that, if they do impose liability on Butlers, as warehousekeeper, for the full duty on the goods,

then, in so doing, they go beyond what is required of them by the 1992 Directive. I have no difficulty in rejecting these two submissions.

[29] Dealing with the first argument, Regulation 7 provides that where there is an excise duty point as prescribed by Regulations 3 or 4, the person liable to pay the excise duty on the occurrence of that excise duty point shall be the person shown as the consignor on the AAD, unless someone other than the consignor is shown in Box 10 of the AAD as having arranged for the guarantee. Two points arise from this. First, it is clear that this case falls within Regulations 3 and/or 4. Regulation 3 applies *inter alia* where excise goods are subject to a duty suspended movement starting in the UK, and in relation to those goods there is an irregularity which occurs or is detected in the UK. Where it is not possible to establish in which member state the irregularity occurred, the excise duty point is the time of the detection of the irregularity or, where that cannot be established, the time when the irregularity first comes to the attention of the Commissioners. That points to the UK. However, in case there is any doubt about that, Regulation 4 applies where there is a duty suspended movement starting in the UK and the goods do not arrive at their destination within four months of their removal from the tax warehouse in the UK. In those circumstances the excise duty point is the time when the goods were removed from that tax warehouse in the UK. In those circumstances, Regulation 7 identifies the person liable to pay the excise duty as being the person shown as consignor on the AAD. It was common ground before me that Butlers were shown as consignor on the AAD. It was common ground also that they had to be shown as consignor on that document. That is put beyond doubt by Regulation 5 of the 2002 Regulations, which provides that excise goods entered for removal from an excise warehouse for exportation to another member state must not be removed from their warehouse unless *inter alia* the authorised warehousekeeper is the consignor named on the AAD. Butlers had to be named as consignor on the AAD. Regulation 7 makes it clear that, in circumstances such as those under consideration here, Butlers is liable to pay the excise duty on the missing goods unless someone else is shown in Box 10 of the AAD as having arranged for the guarantee (and here no one else was so shown).

[30] It was argued that the Regulations should be interpreted consistently with the 1992 Directive to which they are clearly intended to give effect: see *Marleasing SA* v. *La Comercial Internacional de Alimentación SA* (Case-106/89) [1990] ECR I 4135, 4159. That Directive, so the argument went, did not require the warehousekeeper to be held liable for an irregularity such as occurred in the present case without proof of fault; and the Regulations should be construed in such a way as to give effect to this. I cannot accept the submission. Even on the assumption that the Directive, on its proper interpretation, did not impose strict liability on the warehousekeeper in circumstances such as the present, I do not consider that it would be permissible to interpret the Regulations in such a way as to excuse Butlers from liability in circumstances where they were not at fault. As to the permissible extent of a sympathetic construction, I was referred to *Ghaidan* v. *Godin-Mendoza* [2004] 2 AC 557 and *HMRC* v. *IDT Card Services* [2006] STC 1252. These cases make it clear that the legitimacy of any interpretative implication does not depend upon linguistic or grammatical considerations, for example the number of words which require to be implied to produce a reading compliant with the Directive, or the grammatical complexity of so doing, or the like. The question is whether the proposed implication designed to make the Regulations (the domestic legislation) compliant with the Directive "go with the grain" of the domestic legislation; or whether it would result in

a meaning being given to the domestic legislation which is inconsistent with its clear intent. If the former, the implication is permissible; if the latter, it is not. It is not possible to read the 2001 Regulations in such a way as to introduce a test of culpability (of any kind) before a warehousekeeper can be held liable to pay the duty. The clear intent of the 2001 Regulations is that in the event of an irregularity of the kind specified in Regulations 3 and 4 – and the reference to Article 20 in the definition of "irregularity" in the 2001 Regulations makes it clear that it is not dealing with a *force majeure* situation – the excise duty is to be paid by the person shown as consignor on the AAD, unless someone else is shown in Box 10 of the AAD as having arranged for the guarantee. The 2002 Regulations identify the consignor as being the warehousekeeper. There is no doubt that the intent of the Regulations is that, in such circumstances, that person is liable to pay the excise duty regardless of fault. I am satisfied that there is no permissible construction of the 2001 Regulations which would result in Butlers avoiding liability in the present case. Any implication involving a test of culpability or fault would involve adopting a meaning inconsistent with a fundamental feature of the UK legislation.

[31] Turning to the second argument, I am satisfied that, in imposing liability on the warehousekeeper for the full duty on the missing goods, the Regulations do not go beyond what is required of them by the 1992 Directive. Article 20.1 of the 1992 Directive makes the guarantor liable for all losses – other than losses of the type mentioned in Article 14.1 – occurring when the goods are in transit between tax warehouses under duty suspension arrangements. In the ordinary case that guarantor is the warehousekeeper: see Article 13(a) and, more particularly, Article 15.3. There is an exception where the transporter or owner of the goods agrees to provide a guarantee in place of the guarantee which would otherwise be required from the authorised warehousekeeper: see Article 15.3. However, as noted earlier, there is no power to compel the transporter or owner of the goods to provide such a guarantee in place of the warehousekeeper. That is left to be agreed, if it can be agreed, on a commercial basis between the relevant parties. So also in Regulation 7 of the 2001 Regulations, the warehousekeeper, although named as consignor on the AAD, is not required to pay the excise duty on the missing goods if someone else is shown in Box 10 as having arranged the guarantee. That provision is to the same effect as the position under the 1992 Directive. If the warehousekeeper can negotiate with the transporter or owner of the goods that they will provide the guarantee, then they (and not he) will be liable for the duty in circumstances such as the present. Accordingly, under both the 1992 Directive and the 2001 Regulations (read with the 2002 Regulations), the position is the same: the default liability for payment of excise duty on goods which go missing from a duty suspension arrangement falls on the warehousekeeper, but he may be relieved of that liability if he can negotiate that the guarantee required under Article 15.3 of the 1992 Directive is put up not by him but by the transporter or owner of the goods.

[32] Mr Ghosh argued that it was not necessary to give such an absolute interpretation to the word "guarantee" in the 1992 Directive. Articles 13(a) and 15.3 require the warehousekeeper of dispatch to provide a guarantee covering the risks inherent in intra-Community movement. But, he argued, that did not necessarily mean that they had to guarantee payment of the whole amount of duty, nor that they had to guarantee that payment in all circumstances regardless of fault. If this was the proper construction of the Directive, then in imposing strict liability for the whole of the unpaid duty the Regulations went further than the Directive. I cannot accept this

argument. Although Articles 13(a) and 15.3 deal with the question of the guarantee, it is Article 20.1 which imposes upon the person who puts up a guarantee in accordance with those Articles the obligation to pay the excise duty. That is expressed as an unqualified obligation regardless of any potential ambiguity in the meaning of "guarantee" (if there is any potential ambiguity in the use of that word, of which I am not persuaded). It is clear to me that the 1992 Directive is intended to place strict liability to pay the unpaid excise duty on the person providing the guarantee, usually the warehousekeeper, in circumstances of an irregularity occurring during the intra-Community movement under duty suspension arrangements.

[33] In these circumstances, the question of proportionality and legal certainty must be considered under reference to the 1992 Directive. It is accepted that national courts have no power to declare a Directive to be invalid. Mr Ghosh submitted that unless it could be said with confidence that Butlers' appeal must fail, I should make a reference to the ECJ. Guidance on whether to make a reference is to be found in *CILFIT Srl* v. *Minister of Health* [1983] 1 CMLR 472 and *Scotbeef Ltd* v. *Palermo* 2006 SC 1. The test is one of "absolute confidence". I accept that submission.

[34] As a preliminary observation, Mr Ghosh pointed out that the test for breach of EU rights was a function of *a priori* reasoning. It did not require evidence. He referred in this connection to the decision of the Upper Tribunal (Tax and Chancery Chamber) in *The Trustees of the BT Pension Scheme* v. *HMRC* [2013] UKUT 0105 (TCC) at paragraph 71(1), applying the reasoning in *Hughes de Lasteyrie du Saillant* v. *Ministère de L'Economie des Finances et de l'Industrie* [2004] ECR I-2409. Ms Delibegovic-Broome submitted, under reference to Tridimas, General Principles of EU Law, at p.147, that the Court does not exclude evidence where this would help it understand what would or could happen in the real world. I do not consider that there is much difference between these two positions. The Court will adopt *a priori* reasoning. It will, however, be astute to ensure that that reasoning is based on assumptions that are not wholly fanciful but are grounded in reality. To that end, evidence will be admissible to show what are the real possibilities, risk, dangers, etc. to be taken into account in its reasoning. But that is not required in every case and it is not required here. Accordingly I propose to proceed on the basis of *a priori* reasoning.

[35] Mr Ghosh argued that the principle of proportionality was straightforward. Legislation should not go further than was necessary to protect legitimate EU objectives. The imposition of strict liability for payment of excise duty on a warehousekeeper who was in no way at fault for the loss of the goods in transit between tax warehouses – and, indeed, had done all that he could to prevent it and might not even know of those involved in the irregularity – was manifestly inappropriate to the legitimate objective of seeking to ensure the payment of excise duty across the EU. We were not here talking about matters of economic policy, though even in such a case there would still be some scrutiny, albeit at a lower level of intensity. Article 20.1 was a compliance provision, designed to ensure that excise duty was paid. The imposition of strict liability, in the context of a transaction where the warehousekeeper was not only innocent of any wrongdoing but had done all that he could have done and would suffer potentially disastrous consequences if held liable (to the extent of putting him out of business), went well beyond what was necessary to protect the interests of the EU or the member state in the member state being able to collect excise duty. It was not even as though the warehousekeeper was being expected to share the risk; the Directive and the Regulations required him to

underwrite it, to act as a 100% guarantor. Accordingly, both Regulation 7 of the 2001 Regulations and Article 20.1 of the 1992 Directive, when read with Articles 13(a) and 15.3, were disproportionate.

[36] There was some discussion about the intensity of the review appropriate in a case such as this. In *Scotbeef Ltd* v. *Palermo* 2006 SC 1, to which I was referred by Ms Delibegovic-Broome, Lord Brodie said this at paragraph [13]:

> "The principle of proportionality requires that the means used should be proportionate to their purpose. A piece of Community legislation, such as a Council directive, is susceptible to judicial review by reference to this principle and may be found to be unlawful …. Two questions arise for consideration: first, are the means employed by the legislation suitable for the purpose of achieving the desired objective; and second, are these means necessary (in the sense that they do not go beyond what is necessary) for its achievement …. However, on judicial review in matters in which the legislator has a wide discretionary power, such as agriculture … it is only open to the court to find a measure to be unlawful if it is manifestly inappropriate having regard to the objective which the competent institution … intends to pursue …"

I was referred also to *Stolting* v. *Hauptzollamt Hamburg-Jonas* [1979] ECR 713 at paragraph 7 and *Biovilac* v. *EEC* [1984] ECR 4057 at paragraph 17. Ms Delibegovic-Broome submitted that the "manifestly inappropriate" test was applicable here. She referred in this context to Tridimas, General Principles of EU Law, at pp. 137 – 138 and 142ff. She submitted that Regulation 7 was to a large extent implementing economic policy, as were the relevant Articles of the 1992 Directive. Mr Ghosh, for his part, urged me to apply the wider test: is the imposition of strict liability on the warehousekeeper, in circumstances where he may have no responsibility or control over the events giving rise to the irregularity, necessary in the sense of not going beyond what is necessary for the achievement of the aims of the Directive? I shall return to this question at the end, but it seems to me that it would be wrong to regard the matter as consisting of two starkly differing levels of review at opposite ends of the spectrum. It seems to me that the court should regard the intensity of the review required in a particular case as being on a sliding scale, its position on that scale being dependent on a range of circumstances of which perhaps the most important but by no means the only one will be the assessment of whether the measure in question is, on the one hand, at the range of legislative policy making or, on the other, executive or quasi executive implementation.

[37] Mr Ghosh submitted that the principle of legal certainty was equally straightforward. It was that a person with EU rights had to be able to assess the legal and financial consequences of his actions. It required predictability and consistency in the law and its application. Mr Ghosh submitted that it was akin to the doctrine of legitimate expectation. In *Fintan Duff* v. *Minister for Agriculture and Food, Ireland* (Case C-63/93) the ECJ explained that the principle of the protection of legitimate expectations was the corollary of the principle of legal certainty. The principle:

> "… requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable …"

In the present case, he submitted, Butlers' liability arose not because of anything they did or could reasonably have avoided, but because of what was done outwith their control by third parties, including persons unknown. How, he asked rhetorically, could Butlers assess the legal and financial implications of any of their acts as warehousekeeper if they were to be fixed with liability whatever they did? If one cannot assess the consequences of one's acts because those consequences are dictated by the actings of persons who are outwith one's control and who may even be unknown, that breaches the requirement of legal certainty, because liability is triggered by unforeseeable events which may happen despite the taking of all reasonable precautions. Ms Delibegovic-Broome did not dispute the principle of legal certainty, though she submitted that neither the Regulations nor the Directive infringed it.

[38] In *Garrett Trading Ltd* v. *HMRC* (E01061), the FTT appeared to hold that principles of proportionality and legal certainty had no application in the field of excise duty. Mr Ghosh submitted that that decision was simply wrong. I did not understand Ms Delibegovic-Broome to contend otherwise. A number of EU cases decided subsequent to *Garrett* have made it clear that proportionality does apply in this field, and the same is true of legal certainty: see *Heintz van Landewijck Sarl* v. *Staatssecretaris van Financiën* (Case C-494/04) [2006] ECR 1-5381 (an excise duty case), *Netto Supermarkt GmbH* v. *Finanzamt Malchin* (Case C-271/06) [2008] STC 3280 (VAT) and *Vlaamse Oliemaatschappij NV* v. *FOD Financien* (2011, Case C-499/10) (VAT). I accept that submission. The principles of proportionality and legal certainty clearly apply and require careful consideration.

[39] It is useful to look at the above-mentioned cases to extract the relevant guidance to the interpretation and application of the principles. *Heintz* concerned the application of the 1992 Directive to excise duty on cigarettes. A national (Dutch) law required tobacco products released for consumption, and thereby becoming liable for excise duty, to have affixed to them at the time of release excise stamps showing that the excise duty had been paid. Excise stamps were paid for (by an authorised warehousekeeper) but subsequently went missing. The purchaser of the stamps sought to obtain reimbursement. Dutch law, however, refused reimbursement where the disappearance of the stamps was not shown to be attributable to *force majeure* or to an accident and where it was not shown that the stamps had been destroyed or rendered permanently unusable. This put the financial responsibility for loss of tax stamps on to the purchaser. The argument that this was disproportionate was rejected. In his opinion, the Advocate General (Maduro) considered that there was nothing in principle to prevent a member state from laying down rules allocating to the purchaser of tax stamps the risk of the stamps going missing and being used unlawfully at a later stage. That person had the stamps under his supervision and was in the best position to ensure that the risk of unlawful use did not materialise or, at the very least, to protect himself by taking out insurance. He considered that such an arrangement involved allocating the risk based on an assumption of responsibility by the party best placed to carry out monitoring of the stamps, since there would be no incentive for him to take care of them if he was reimbursed the amount paid for the stamps in the

event that they simply went missing: see paragraphs 38 and 44. But he went on to say that the outcome would have been different if the rules had not provided for any possibility of reimbursement in the event that the stamps were destroyed or made definitely unusable as a result of an accident or *force majeure* event. The Court agreed (see paragraphs 39 – 46). It held that in the circumstances described by the Advocate General, the national rules could not be regarded as contrary to the principle of proportionality. Two points emerge from this. First, although the challenge based on proportionality failed, it is a clear case of the Court accepting the application of the principle of proportionality to the excise duty regime set up under the 1992 Directive. Second, the Court emphasised that, because they did not preclude the possibility of recovery of the duty in certain situations, such as *force majeure* or accident, the national rules did not exceed what was necessary to pursue the legitimate objective of preventing the fraudulent use of the stamps.

[40] *Netto* was a VAT case. A company operating discount supermarkets in Germany refunded VAT paid on goods purchased in its supermarkets by customers not established within the EU. It did so upon production by the customer, in accordance with the Sixth Directive, of documentation duly stamped by the relevant customs authorities. The company asked the German customs office to check certain stamps on the forms which appeared to it to be counterfeit, but were reassured that they were genuine. Later the German tax office changed its mind and concluded that the stamps on the forms were not genuine. It then assessed the company to VAT for a period of three years in respect of the VAT refunds which had been made by the company on the basis of that false documentation. The Bundesfinanzhof referred to the ECJ the question whether Article 15(2) of the Sixth Directive precluded a member state from granting an exemption from VAT on the supply of goods to a destination outside the EU where the conditions for such exemption were not met but the taxable person was not able to recognise, even by exercising due commercial care, that they were not met, because the export documents had been forged. It was held that, in the exercise of the powers conferred on them by the EU Directive, member states had to respect the general principles of law forming part of the Community legal order, including, in particular, the principles of legal certainty and proportionality and the protection of legitimate expectations. It would not be compatible with the principle of proportionality if the tax regime imposed the entire responsibility for the payment of VAT on the supplier, regardless of whether or not he was involved in the fraud. Accordingly, the Directive did not preclude a member state from granting an exemption from VAT on the supply of goods for export to a destination outside the EU where the conditions for such an exemption were not met by the taxable person who was not able to recognise, even by exercising due commercial care, that they were not met because the export documents had been forged.

[41] In the course of the opinion of the Advocate General, it was noted that the exporter was, in effect, in the position of tax collector for the government, since he did not benefit from the payment of VAT. The relevant part of the decision of the ECJ begins at paragraph 16. In paragraph 17 it was emphasised, in terms of the Directive, that member states must lay down conditions for the purpose of "preventing any evasion, avoidance or abuse". In paragraph 18 it was noted that member states must respect the general principles of law of the EU, including legal certainty and proportionality and the principle of protection of legitimate expectation. So far as concerns proportionality, the court had this to say at paragraph 19:

> "In particular, as regards the principle of proportionality, the court has already held that, in accordance with that principle, the member states must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant Community legislation …"

The court carried on in paragraph 20 to conclude that whilst it was legitimate for the measures adopted by the member states to seek to preserve the rights of the public exchequer as effectively as possible, "such measures must not go further than is necessary for that purpose". The court noted again that suppliers of goods act as tax collectors in the field of VAT. That was why the objective of preventing tax evasion sometimes justified stringent requirements as regards their obligations. But the court went on to say this in paragraphs 22 – 25:

> "22. … However, any sharing of the risk between the supplier and the tax authorities, following fraud committed by a third party, must be compatible with the principle of proportionality (*Teleos* (para 58)).
>
> 23. That will not be the case if a tax regime imposes the entire responsibility for the payment of VAT on suppliers, regardless of whether or not they were involved in the fraud committed by the purchaser (see, to that effect, *Teleos* (para 58)). As the Advocate General has pointed out in para 45 of his opinion, it would clearly be disproportionate to hold a taxable person liable for the shortfall in tax caused by fraudulent acts of third parties over which he has no influence whatsoever.
>
> 24. On the other hand, as the court has already held, it is not contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see *Teleos* (para 65), and the case law cited there).
>
> 25. Accordingly, the fact that the supplier acted in good faith, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that supplier can be obliged to account for the VAT after the event (see *Teleos* (para 66))."

Mr Ghosh sought to draw a direct parallel between the principles enunciated in *Netto* and the circumstances of the present case. The guarantor – in this case the warehousekeeper who was not the importer and was therefore not the person primarily chargeable with the excise duty – should not be fixed with the obligation to pay duty in circumstances over which he had no control. It should be noted, however, that in paragraph 25 of its judgment, the court held that this was an important point in deciding whether the supplier should be obliged to pay – but it was not a conclusive factor.

[42] *Vlaamse* was also a VAT case and involved national legislation holding the warehousekeeper jointly and severally liable for payment of tax due by the taxable

person who owned the goods, even where the warehousekeeper acted in good faith and where no fault or negligence could be imputed to him. The court came to a similar conclusion as in *Netto*. The essence of the decision is to be found in paragraphs 24 – 26 of the judgement of the Court:

> "24. The Court has already held that national measures which bring about, *de facto*, a system of strict joint and several liability go beyond what is necessary to preserve the public exchequer's rights (see *Federation of Technological Industries and Others*, paragraph 32). Imposing responsibility for paying VAT on a person other than the person liable to pay that tax, even where that person is an authorised tax warehousekeeper bound by the specific obligations referred to in Directive 92/12, without allowing him to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay the tax must, therefore, be considered contrary to the principle of proportionality. It would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever (see, to that effect, *Netto Supermarkt*, paragraph 23).
>
> 25. On the other hand, it is not contrary to European Union law to require the person other than the personal (sic) liable to pay the tax to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see, to that effect, *Federation of Technological Industries and Others*, paragraph 33; *Teleos and Others*, paragraph 65; and *Netto Supermarkt*, paragraph 24).
>
> 26. Accordingly, the fact that the person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that person can be obliged to account for the VAT owed (see *Teleos and Others*, paragraph 66 and *Netto Supermarkt*, paragraph 25)."

The judgment in that case reaffirms what was said in *Netto*, with perhaps even greater emphasis on the fact that the person upon whom strict liability was sought be imposed was not the person primarily liable to pay the tax.

[43] I was also referred to the case of *Atalanta Amsterdam BV* v. *Produktschap voor Vee en Vlees* [1979] ECR 2137. That was concerned with the forfeit of deposits. Article 4(2)(b) of the relevant Regulation restricted the category of applicants entitled to tender for and conclude a contract to those who had given security for the fulfilment of their contract obligations by lodging a deposit "which shall be forfeited in whole or in part if these are not fulfilled or are only partially fulfilled". Article 5(2), however, provided that the security would be "wholly forfeit" if the obligations imposed by the contract were not fulfilled. The court held, at paragraph 15, that:

> "… The absolute nature of Article 5(2) of the above-mentioned regulation is contrary to the principle of proportionality in that it does not permit the

> penalty for which it provides to be made commensurate with the degree of failure to implement the contractual obligations or with the seriousness of the breach of those obligations."

This is another illustration of the application of the principle of proportionality. I need not go into that case in any greater detail.

[44] I do not consider that those cases, or the various considerations referred to in them, assist Butlers in their argument that the "strict liability" regime (as they would characterise it) pursuant to which they have been held liable for the excise duty on the goods which have been stolen whilst in transit between tax warehouses under duty suspension arrangements offends the principle of proportionality. I come to this conclusion for the following reasons.

[45] The policy behind the 1992 Directive is to ensure the effective functioning of the single market and, to this end, establish a uniform regime across all member states for the collection of excise duty. Inherent in this policy objective is the establishment of a procedure for the movement of goods "under duty suspension" between member states. This involves goods being kept in tax warehouses and transported between member states from one tax warehouse to another. It must have been recognised, so it seems to me, that movement of goods on which duty had not yet been paid had the potential to attract criminal conduct resulting in the non-payment of duty at the time when the goods were released for consumption. While any system which allows the free movement of goods is to be encouraged, a countervailing consideration is that excise duties should be collected and that the permitted system of movement of goods under duty suspension between tax warehouses should not be allowed to become an avenue for the avoidance of duty. In those circumstances, it is objectively justifiable that a default responsibility should be placed upon someone for the payment of duty if the goods are stolen and duty is not paid by the person primarily liable. That "someone" might, I suppose, have been identified as being the consignee of the goods, or the transporter. Had it been either of them, the same argument about proportionality might have been raised by them. In fact, the Directive points in the first instance to the warehousekeeper. Again, looking at the matter objectively, there is no ground for saying that this is an unreasonable approach. It is the keeper of a tax warehouse who reaps the benefit of the system of intra-Community transit of goods under duty suspension arrangements. It is the warehousekeeper who accepts instructions to receive and warehouse the goods and, in the case where intra-Community transit is proposed, accepts and carries out the instructions to arrange and effect shipment, by land, sea or air. Furthermore, the warehousekeeper is in a position to protect himself against liability – I come to that point later.

[46] Before turning to that, however, it is important to note that the liability imposed on the warehousekeeper (or other person if that can be arranged) is not an absolute liability in the sense of the warehousekeeper being, as Mr Ghosh put it, an insurer or "a 100% guarantor" of the excise duty. He is not liable for natural wastage in storage or in transit, nor is he liable if the loss is due to circumstances of *force majeure*: see Article 14.1. This is an important qualification, and one missing, as I understand it, from the VAT decisions of *Netto* and *Vlaamse*. For the record I should note that an argument that in this case Butlers could avoid liability on that basis, namely that this was a *force majeure* event, was rejected by the FTT and was not renewed before me.

[47] I indicated that I would come back to the question of whether the warehousekeeper could protect himself against liability. The obvious possibility is insurance. I heard no evidence to suggest that the risk of being held liable for the duty would not be insurable, the premium no doubt depending to a very large extent upon the insurer being satisfied as to the steps taken by the warehousekeeper to guard against the occurrence of any such irregularity. However, in addition to insurance, there are, in fact, at least two other ways in which he can seek to protect himself.

[48] The first way is by seeking to procure that either the owner of the goods or the transporter puts up the guarantee in terms of Article 15.3. That provides that the competent authorities in the member states may permit the transporter or the owner of the products to provide a guarantee "in place of that provided by the authorised warehousekeeper of dispatch". As I said earlier, that does not give the authorities of the member state power to insist that the owner or the transporter of the goods does give a guarantee in place of the warehousekeeper. But they may permit that to happen if such an arrangement can be agreed between the warehousekeeper and either the owner or the transporter. The UK Regulations giving effect to the 1992 Directive do permit this. If that is done, then the liability under Article 20.1 falls on the owner or the transporter as the person who has given the guarantee, and not on the warehousekeeper. It was suggested by Mr Ghosh in argument that this was fanciful or unrealistic. How was the warehousekeeper ever to persuade or force the owner of the goods or the transporter to give that guarantee? While I can see that there might be commercial difficulties on a case-by-case basis, I see nothing implausible about the possibility of that being achieved. No doubt it would have to be matter of commercial discussion, perhaps involving trade federations or other representative bodies. But, as I say, I do not regard that possibility as being either unreasonable or implausible.

[49] The other way is to negotiate a bond or guarantee to be given by the owner or transporter of the goods. This, again, would have to be a matter of commercial negotiation, but there is no reason in principle why one should not be obtainable even if it were not a bond for the full potential liability. That would enable the risk to be shared.

[50] I should mention also the potential to recover a contribution from the person who has caused the irregularity. Regulation 7(2) of the 2001 Regulations provides that any person who causes or has caused the occurrence of an excise duty point by virtue of an irregularity is jointly and severally liable to pay the duty with the warehousekeeper or other person who has arrange the guarantee and is named as such in the AAD. So there would be a right of contribution against that person. I accept, of course, that such a right might be difficult to enforce, but it cannot be discounted altogether. Such a right would, of course, provide a basis upon which a bond could be required from the owner or transporter of the goods before they left the warehouse.

[51] In summary, therefore, I consider that, in seeking to ensure the payment of excise duty while permitting movement of goods under duty suspension arrangements, it is neither unreasonable nor disproportionate to stipulate that, except in a case where goods are lost due to some *force majeure* event (in which case no liability attaches), a person involved in the movement of the goods should be liable for the duty which is unpaid as a result of the goods being stolen in transit or otherwise removed from the duty suspension arrangement as a result of an irregularity. Such a measure is in my view necessary to achieve that purpose. The alternative of fault based liability would be difficult to enforce and would, in all

likelihood, result in the non-recoverability of significant amount of duty. That, at any rate, appears to be the thinking behind the approach taken in the Directive and I can see no basis for saying that that is an unreasonable approach. Nor is it either unreasonable or disproportionate for that liability to be laid in the first instance at the door of the warehousekeeper, since the tax warehouse is at the heart of the system of storage and movement of goods under duty suspension arrangements – the warehousekeeper profits from the tax warehouse duty suspension arrangements, and he is in as good a position as anyone to make appropriate arrangements for the transport to another tax warehouse. But it is open to the warehousekeeper to avoid such liability. He can attempt to reach a commercial agreement with others, viz the owner of the goods or the transporter, so that they provide the guarantee and thereby assume liability in his place. He can refuse to take duty suspended goods except on these terms. If he cannot do this, or prefers not to do it, he can spread the risk by negotiating to obtain a bond or guarantee from the owner or transporter covering all or some of his potential liability. He can obtain insurance cover. Ultimately, if he considers that the risk is too great, or the price of entering into appropriate arrangements with the owner or transporter is too high, he can opt out of handling goods under duty suspension arrangements. The imposition of liability on the warehousekeeper in such circumstances does not, in my view, go further than is necessary to achieve the purpose I have mentioned.

[52] Accordingly, I reject the argument based on proportionality. Earlier in this decision, in paragraph [36], I discussed the test for assessing the question of proportionality: was it the "manifestly unsuitable" test or something wider. I have come to the view that whichever test one applies, even if one simply asks whether the imposition of strict liability in the circumstances goes beyond what is necessary, there is nothing disproportionate in imposing strict liability and doing so, in the first instance, by identifying the warehousekeeper as the person who will be held liable if he cannot take the steps necessary to shift that liability onto the owner or transporter of the goods.

[53] I also reject the argument based on legal certainty. The principle is well-established. A person should be able to assess with some degree of certainty the legal and financial consequences of his acts. I do not consider that there is any difficulty in the circumstances of the present case. A warehousekeeper of a tax warehouse, a significant part of whose business depends upon chargeable goods being held "in bond" under duty suspension arrangements and being transported between warehouses under such arrangements, knows that the duty suspension arrangements have or involve the following characteristics: (i) that in the event that goods go missing whilst in transit – other than through *force majeure* events – strict liability will be imposed for the excise duty which, as a consequence, is not recovered from the person primarily chargeable with the duty; (ii) that the person liable under that strict liability regime will be the guarantor, i.e. the person who has put up the guarantee in terms of Articles 13(a) and 15.3; (iii) that that person will be the warehousekeeper of the tax warehouse from which the goods are dispatched, unless he can arrange with the owner of the goods or the transporter that they put up a guarantee in his place; (iv) that the warehousekeeper will not be liable for the duty if he can procure that the owner or the transporter put up a guarantee in his place; but (v) if he cannot procure that they put up a guarantee in his place, he will be liable despite having taken all reasonable care about the transit arrangements. In such circumstances the warehousekeeper knows precisely what is the extent of his potential

liability. He may not be able to prevent the loss of the goods through fraud or theft, and therefore may not be able to avoid becoming liable for the duty. But that is a price that he has to pay for his involvement in what, presumably, is a lucrative or least adequately rewarded occupation. It can perhaps be inferred that unless there was a regime of strict liability the availability of in transit movement of duty suspended goods might have to be reconsidered. On the basis that he knows that, unless he procures that the owner of the goods or the transporter provides a guarantee in his stead, he will be held liable for the duty where the goods are stolen despite his having taken reasonable care over the transit arrangements, the warehousekeeper can do or attempt to do a number of things. He can accept goods only on terms that the owner agrees to give a guarantee in his place. He can agree to allow the goods to be moved from his tax warehouse to another only on terms that either the owner or the transporter agrees to give such a guarantee. He can agree to accept or allow movement of the goods only on terms that the owner or transporter will put up a bond for all or part of the unpaid duty which he can call upon in the event that he is held liable. He can take out insurance to cover his potential liability. I was given no information as to whether any of these steps are commercially practicable. In principle I see no reason why they should not be. But whether that is so or not, that does not alter the fact that the warehousekeeper can be absolutely clear as to the legal position if, having given the guarantee, the goods are removed from the duty suspension arrangements by an irregularity occurring in transit.

[54] In the *Netto* case to which I have referred earlier, the principle of legal certainty was invoked. The facts of that case, set out above, were striking. The supplier had reasonably relied upon documents which it had been assured by the relevant officials were genuine. On that basis it had refunded the VAT to the customer. It is not surprising that the court upheld the legal certainty argument, since if the supplier could not even rely upon the confirmation from the tax authorities that the documents were genuine and therefore it was permissible to refund the VAT without later being held to account for it to the tax authorities, how was it to know where it stood. As the court to put it in paragraphs 26 and 27:

> "26. … it would be contrary to the principle of legal certainty if a member state which has laid down the conditions for the application of the exemption of supplies of goods for export to a destination outside the Community by prescribing, among other things, a list of the documents to be presented to the competent authorities, and which has accepted, initially, the documents presented by the supplier as evidence establishing entitlement to the exemption, could subsequently require that supplier to account for the VAT on that supply, where it transpires that, because of the purchaser's fraud, of which the supplier had and could have had no knowledge, the conditions for the exemption were in fact not met (see, to that effect, *Teleos* (para 50))
>
> 27. It follows that a supplier must be able to rely on the lawfulness of the transaction that he carries out without risking the loss of his right to exemption from VAT, if, as in the case in the main proceedings, he is in no position to recognise – even by exercising due commercial care – that the conditions for the exemption were in fact not met, because the export proofs provided by the purchaser had been forged."

The court went on in the next paragraph to emphasise that the case law in the field of customs law, "according to which an operator who cannot provide evidence that the conditions necessary for the grant of remission from export or import duties are satisfied must bear the consequences arising from that inability, despite having acted in good faith", could not be relied upon in the VAT system of taxation "because of the differences in structure, object and purpose between such a system and the Community regime on the levying of customs duties." *Netto* was an extreme case which illustrates the closeness of the principle of legal certainty with that of legitimate expectation. It is of little assistance in a case such as the present where the regime for the imposition of liability in certain circumstances is clearly delineated by the Directive.

[55] I am reinforced in the conclusion I have reached both on proportionality and legal certainty by the following two cases to which I was referred in argument. Neither involved a challenge to the Directive and no issues of proportionality and legal certainty were raised in argument. Nonetheless, the judgments provide relevant and useful observations as to the likely justification for and reasonableness of the strict liability arrangements.

[56] The first, in date order, is *Re. The Arena Corporation Limited, The Arena Corporation Limited* v. *Schroeder* [2004] EWCA Civ 371, in which the Court of Appeal upheld the imposition of strict liability for excise duty on goods which had been stolen while in transit under a duty-suspension arrangement. The issue in that case was whether Regulation 7(2) of the 2001 Regulations was invalid as contrary to or inconsistent with the 1992 Directive, in that it purported to make a person who caused the occurrence of the excise duty point jointly and severally liable for the excise duty, even though in terms of Article 15.3 of the Directive only the warehousekeeper, the owner of the goods and the transporter were identified as being potentially subject to that liability. The leading judgement was given by the Vice-Chancellor. At paragraph 28 of his judgement he cited with approval the reasoning of Lindsay J (as it appeared from paragraph 30 of his judgement):

> "Equally, Article 20(1) provides that it is to the guarantor that the Member States should look for payment. It is easy to see why that should be so. Where a load of alcoholic drinks, moving under a suspension arrangement, are stolen or are dissipated or vanish without obvious explanation it will plainly be very often difficult, if not impossible, to say when and where the irregularity occurred and who was responsible for it or complicit in it. To avoid that sort of problem the Directive provides instead for liability upon guarantee. Simultaneously it created clear liability irrespective of culpability and a powerful incentive upon the guarantors to do their best to ensure safe arrival without irregularities. For a Member State to add a civil liability not based on guarantee but on some form of causation or culpability (and perhaps on a knowing participation) would be to revert to the very forms of liability which one can assume had proved or were likely to prove so difficult to bring home that the Directive (it would be argued) had replaced them or had never employed them. …"

That gives the main justification for imposing strict liability as opposed to liability based on fault. I find that persuasive. It does not, of course, deal with the identity of

the person on whom that strict liability should be imposed, but that is a secondary question. The remainder of that passage deals with the argument that by introducing a liability based on causation or culpability, that might cause differences to emerge between the excise duty regimes in different member states and thereby give rise to an interference with the free movement of goods which the Directive was striving to achieve and protect. I need not quote from that part of the judgment, but that too is a relevant and important further justification for the imposition of a strict liability regime.

[56] The second case is *Greenalls Management Limited* v. *Customs and Excise Commissioners* [2005] 1 WLR 1754. That raised the question of the liability of a tax warehousekeeper to pay excise duty when goods in transit under duty suspension arrangements were fraudulently diverted and never reached the intended destination. That case was considered under the 1992 Regulations, the effect of which is summarised at paragraph [20] above. The House of Lords held by a majority that the warehousekeeper was liable to pay the duty. At paragraph 7 of his speech, Lord Hoffmann, with whom the others in the majority agreed, says that the 1992 Directive, while fixing the point at which excise duty became chargeable because of the irregular departure from the suspension arrangement, "says nothing about who should be liable to pay the duty". It may be that Article 20.1 was not brought to the attention of the court, since the dispute appears to have turned on the construction of Regulations 4(2)(a) and 5(4). However, for present purposes that does not matter. At first instance, the judge had held that the warehousekeeper was not liable, because he was persuaded to read into Regulation 4(2)(a) the words "from the warehouse", thereby restricting the warehousekeeper's liability to a case where goods were lost or stolen from the warehouse. At paragraph 17 of his speech Lord Hoffmann asked why the judge had taken this course in light of the fact that he (the first instance judge) had found the imposition of liability on the warehousekeeper to be entirely reasonable. He said this:

> "It is not easy to understand why the judge decided to add these words. He did not accept the argument of Mr Venables that a restriction in the scope of the paragraph was needed because otherwise the regulation, read with 5(4), would be unreasonable and unfair, imposing upon the warehouse keeper a liability which … "he had done nothing to deserve". Counsel had submitted that for this reason one should imply a requirement that the goods had been made available for consumption "by the warehousekeeper". But the judge rejected this submission. He said that there was nothing unreasonable about making the warehousekeeper liable for the duty even though he did not himself intend to depart from the suspense arrangements. It is practical because the commissioners do not have to investigate the extent, if any, to which the warehousekeeper was to blame in parting with the goods. If someone else was responsible, the warehousekeeper is not without remedy. By virtue of the joint and several liability created by regulations 5(5) and (6), he has a right of recourse against those primarily responsible for the diversion. Of course he may in practice find it difficult to pursue them. But the commissioners are in the same position. The warehousekeeper 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."

Lord Hoffmann went on, in paragraph 18, to say that he found those arguments "entirely convincing". He referred, at paragraph 24, to the judgment of Schiemann LJ in the Court of Appeal, to whom it had appeared obvious that regulation 5(4) "was not intended to impose liability on a warehousekeeper in circumstances where he is utterly blameless and no longer has any connection with the goods". Lord Hoffmann rejected this broad equitable argument. Lord Walker of Gestingthorpe expressed some doubts about the ultimate decision, though he fell short of dissenting, but was prepared to approach the matter on the basis that "there is no unfairness or injustice in the notion that it [the warehousekeeper] may become liable for large sums of excise duty in circumstances where it is not at fault": see paragraph 38. He pointed out that the status of an authorised warehousekeeper

> "… carries heavy responsibilities and, no doubt, commensurate financial advantages. It does business on a large scale and has access to expert advice as to its potential liabilities, and the extent to which they could be covered by insurance, secured guarantees, or similar arrangements."

It is true that no argument was addressed to the court on proportionality or legal certainty. However, the remarks of Lord Hoffmann and Lord Walker are the clearest possible indications that, standing the position of the warehousekeeper and the commercial advantages which he gains from that position, his ability to get expert legal advice, and the opportunities open to him to avoid his potential liability as guarantor or to obtain cover against it by insurance, guarantees or other arrangements, the imposition on him of a strict liability for the excise duty if the goods go missing while in transit during an excise duty suspension arrangement cannot be regarded as unfair. By the same token, it is difficult to see them as being either disproportionate or infringing legal certainty.

[57] Having arrived at my decision on the matters argued before me, I still have to consider whether I should make a reference to the ECJ. I accept that I should do so if I was in any real doubt about my conclusions. The test is one of "absolute confidence". I have concluded, however, that I do not have any real doubt that the arguments so attractively presented on behalf of Butlers must fail. In those circumstances I do not propose to make a reference.

Decision

[58] For the above reasons, Butlers' appeal is refused.

Lord Glennie

Release Date: 13 November 2013