[2016] UKUT 0429 (TCC)

Appeal number: UT/2015/0035

EXCISE DUTY – preliminary issue -whether person holding goods where excise duty unpaid and the goods have previously been released for consumption in the same Member State liable to be assessed for the unpaid duty

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Appellants**

- and –

B & M RETAIL LIMITED

Respondent

TRIBUNAL: Mr Justice Henderson
Judge Timothy Herrington

Sitting in public at the The Rolls Building, Fetter Lane, London EC4A 1NL on 11 and 12 July 2016

Kieron Beal QC and Simon Charles, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Rupert Baldry QC and Jeremy White, Counsel, instructed by Fieldfisher LLP, for the Respondent

DECISION

Background

1. This is an appeal against a decision of the First-tier Tribunal ("FTT") (Judge Blewitt as she then was) in respect of certain preliminary issues released on 16 September 2014 (the "Decision").

2. As found by the FTT in the Decision, the Respondent ("B & M") trades as one of the UK's leading value retailers with many product ranges, including food & drink. On 23 November 2011, the Appellants ("HMRC") attended B & M's warehouse and detained a quantity of excise goods consisting of beer and wine that had been purchased from a supplier, The Ruby Trading Company Limited. HMRC claimed to detain the goods under section 139 of the Customs and Excise Management Act 1979 ("CEMA") on the grounds that, in their judgment, on a balance of probabilities excise duty had not been paid on the goods. Under B & M's terms and conditions of business B & M's suppliers are required to warrant the sale of alcohol to B & M as "excise duty paid".

3. HMRC undertook an investigation during which they found no evidence to show that any of the goods were duty paid. HMRC established that the supply chains traced back to missing or de-registered traders. The goods were formally seized pursuant to section 139(6) and paragraph 1 of Schedule 3 of CEMA and Part 16, section 88 of the Excise Goods (Holding, Movement & Duty Point) Regulations 2010 (the "Regulations").

4. HMRC subsequently assessed B & M for excise duty on the goods in an amount of £5,875,143 and served a Notice of Penalty Assessment on B & M in the sum of £1,175,028.60. The assessments were made on the basis that:

(1) an excise duty point had been created under Regulation 6 (1) (b) of the Regulations; and

(2) B & M was a person liable to duty under Regulation 10 (1) of the Regulations, as the person holding the excise duty goods at the excise duty point.

5. B & M appealed to the FTT against the assessments and the penalty. The FTT directed that the following issues should be determined as preliminary issues on the appeal:

(1) whether there can be more than one excise duty point under the Regulations;

(2) whether, after goods have been released for consumption, there can be a further release for consumption without those goods being again charged with duty by reason of some further production or some further importation; and

(3) whether a person holding goods can be liable for duty by virtue of Regulation 6 (1) (b) of the Regulations, if before he held them, an excise duty point arose under one of paragraphs 6 (1) (a), (c) or (d) of the Regulations.

6. By the Decision, the FTT decided the preliminary issues as follows:

(1) there cannot be more than one excise duty point;

(2) after the goods have been released for consumption at an identified point, there cannot be a further release for consumption and therefore the goods cannot be charged again with duty by reason of some further production or further importation; and

(3) pursuant to Regulation 6 (1) (b) of the Regulations, a person cannot be liable for duty if, before he held the goods, an identified excise duty point arose pursuant to one of Regulations 6 (1) (a), (c) or (d).

7. On 14 January 2015 the FTT granted HMRC permission to appeal against the Decision.

Relevant legislation

8. Section 1 (1) of the Alcoholic Liquor Duties Act 1979 ("ALDA") provides that certain alcoholic liquors (referred to in ALDA as "dutiable alcoholic liquor") are subject to excise duty.

9. Section 36 (1) ALDA provides:

> "There shall be charged on beer –
>
> (a) imported into the United Kingdom, or
>
> (b) produced in the United Kingdom
>
> a duty of excise at the rates specified in subsection (1AA) below."

10. Section 54 ALDA so far as relevant provides:

> "(1) There shall be charged on wine –
>
> (a) imported into the United Kingdom; or
>
> (b) produced in the United Kingdom by a person who is required by subsection (2) below to be licensed to produce wine for sale,
>
> a duty of excise at the rates shown in Schedule 1 to this Act …"

11. Council Directive 2008/118/EC ("the 2008 Directive") lays down general arrangements for excise duty which seek to harmonise the principles to be applied across the EU Member States as regards the point at which excise duty should be levied on excise goods. The 2008 Directive also sets out principles governing the duty-suspended movement of goods between Member States. The 2008 Directive replaced Council Directive 92/12/EEC (the "1992 Directive") which formerly governed these matters.

12. Recital 8 of the 2008 Directive sets out clearly the policy behind the Directive as follows:

"Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise goods are released for consumption and who the person liable to pay the excise duty is."

13. Article 1 states that the 2008 Directive lays down general arrangements in relation to excise duty which "is levied directly or indirectly on the consumption of… [excise goods]".

14. Article 2 provides that:

"Excise goods shall be subject to excise duty at the time of:

(a) their production, including where applicable, their extraction, within the territory of the Community;

(b) their importation into the territory of the Community"

15. Article 7 makes provision for the time and place of chargeability of excise duty relevantly as follows:

"1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:

(a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

(b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;

(c) the production of excise goods, including irregular production, outside a duty suspension arrangement;

(d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

3. The time of release for consumption shall be:

(a) in the situations referred to in Article 17(1)(a)(ii), the time of receipt of the excise goods by the registered consignee;

(b) in the situations referred to in Article 17(1)(a)(iv), the time of receipt of the excise goods by the consignee;

(c) in the situations referred to in Article 17(2), the time of receipt of the excise goods at the place of direct delivery.

16. Article 8 prescribes who shall be liable to pay excise duty that has become chargeable as follows:

"1. The person liable to pay the excise duty that has become chargeable shall be:

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

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

(ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;

(b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;

(c) in relation to the production of excise goods as referred to in Article 7(2)(c): the person producing the excise goods and, in the case of irregular production, any other person involved in their production;

(d) in relation to the importation of excise goods as referred to in Article 7(2)(d): the person who declares the excise goods or on whose behalf they are declared upon importation and, in the case of irregular importation, any other person involved in the importation.

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

17. Article 9 prescribes the chargeability conditions and procedures for collection as follows:

> "The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place.
>
> Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States."

18. Article 10 contains detailed provisions regarding the consequences of an irregularity occurring during the movement of excise goods under a duty suspension arrangement. So far as relevant, it provides:

> "1. Where an irregularity has occurred during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), the release for consumption shall take place in the Member State where the irregularity occurred.
>
> 2. Where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), and it is not possible to determine where the irregularity occurred, it shall be deemed to have occurred in the Member State in which and at the time when the irregularity was detected.
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> 3. In the situations referred to in paragraphs 1 and 2, the competent authorities of the Member States where the goods have been or are deemed to have been released for consumption shall inform the competent authorities of the Member State of dispatch.
>
> 4. Where excise goods moving under a duty suspension arrangement have not arrived at their destination and no irregularity giving rise to their release for consumption in accordance with Article 7(2)(a) has been detected during the movement, an irregularity shall be deemed to have occurred in the Member State of dispatch and at the time when the movement began, unless, within a period of four months from the start of the movement in accordance with Article 20(1), evidence is provided to the satisfaction of the competent authorities of the Member State of dispatch of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.
>
> …"

19. Article 12 makes provision for a limited number of exemptions from payment of excise duty, for example where the goods are intended to be used in the context of diplomatic or consular relations. Article 12 (2) provides that exemptions shall be subject to conditions and limitations laid down by the host Member State and that Member States may grant the exemption by means of a refund of excise duty.

20. Article 15 (2) provides that the production, processing and holding of excise goods, where the excise duty has not been paid, shall take place in a tax warehouse.

21. Article 17 makes provision for the movement of excise duty goods under a duty suspended arrangement within the territory of the Community, including from one tax warehouse to another or from a tax warehouse to a registered consignee.

22. Article 33 makes provision for the charging of excise duty in a second Member State when they have already been released for consumption in another Member State. So far as relevant, it provides:

> "1. Without prejudice to Article 36 (1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.
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> …
>
> 6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find an excise duty has become chargeable and has been collected in that Member State."

23. We make a number of observations on the principles to be derived from the wording of the 2008 Directive as follows.

24. First, Article 1 makes it clear that excise duty is a tax to be levied on the *consumption* of excise goods, although Article 2 provides that those goods become *subject to* excise duty at the time of their production within, or importation into, the EU.

25. Secondly, Article 7 provides that excise duty becomes *chargeable* at the time of the "release for consumption" of the goods in the Member State in which they are so released, and the person who then becomes liable to pay the excise duty at that point is determined by the application of Article 8, the identity of that person depending on the event concerned which causes the release for consumption.

26. Thirdly, there is a distinction to be drawn between the concept of chargeability to excise duty and the levy and collection of that duty, Article 9 providing that the latter is to be determined according to the procedure laid down by the Member State in which the goods have become chargeable with excise duty.

27. The 2008 Directive therefore proceeds on the basis that the event that triggers the chargeability of the goods to excise duty will take place in one Member State alone, with the goods then becoming subject to duty in that Member State. The only exception to that principle is Article 33, which makes provision for excise duty to be charged again in a second Member State after the goods have been already released for consumption in another Member State. That can happen in respect of goods which have already been released for consumption in the first Member State but which subsequently become held in the second Member State for commercial purposes.

28. We observe, however, that the goods do not become chargeable in the second Member State on the basis that there is a second release for consumption within the EU, but rather on the basis that the goods become held in the second Member State for a commercial purpose. In that situation, the chargeability conditions and rate of excise duty to be applied shall be those in force when the duty becomes chargeable in the second Member State. Double taxation is avoided because the excise duty paid in the Member State where the release for consumption took place must be reimbursed or remitted upon request.

29. The Finance (No. 2) Act 1992 (the "1992 Act") contains the necessary authority for the making of regulations to implement the provisions in the 2008 Directive concerning the chargeability of goods to excise duty in the United Kingdom and the persons liable to pay such duty. Section 1 of the 1992 Act, so far as relevant, provides:

> "(1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ("the excise duty point").
>
> (2) Where regulations under this section fix an excise duty point for any goods, the rate of duty for the time being in force at that point shall be the rate used for determining the amount of duty to be paid in pursuance of the requirement that takes effect at that point.
>
> (3) Regulations under this section may provide for the excise duty point for any goods to be such of the following times as may be prescribed in relation to the circumstances of the case, that is to say—
>
> (a) the time when the goods become chargeable with the duty in question;
>
> (b) the time when there is a contravention of any prescribed requirements relating to any suspension arrangements applying to the goods;
>
> (c) the time when the duty on the goods ceases, in the prescribed manner, to be suspended in accordance with any such arrangements;
>
> (d) the time when there is a contravention of any prescribed condition subject to which any relief has been conferred in relation to the goods;

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

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

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

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

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

30. Thus it can be seen that the provisions set out at [29] above introduce the concept of the "excise duty point" by reference to which the time at which the goods become chargeable to UK excise duty will be ascertained, whether by virtue of provisions implementing Article 7 or Article 33 of the 2008 Directive.

31. The Regulations are the relevant regulations made pursuant to the powers contained in the 1992 Act currently in force. The Regulations also implement other provisions of the 2008 Directive.

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

33. Regulation 6(1) states as follows:

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

(a) leave a duty suspension arrangement;

(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;

(c) are produced outside a duty suspension arrangement; or

(d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement."

34. Regulation 7(1) provides:

"(1) For the purposes of regulation 6(1)(a), excise goods leave a duty suspension arrangement at the earlier of the time when—

(a) they leave any tax warehouse in the United Kingdom or are otherwise made available for consumption (including consumption in a tax warehouse) unless—

(i) they are dispatched to one of the destinations referred to in regulation 35(a); and

(ii) are moved in accordance with the conditions specified in regulation 39;

(b) they are consumed;

(c) they are received by a UK registered consignee;

(d) they are received by an exempt consignee in cases where the goods are dispatched from another Member State;

(e) the premises on which the goods are deposited cease to be a tax warehouse;

(f) they are received at a place of direct delivery in the United Kingdom;

(g) they leave a place of importation in the United Kingdom unless—

(i) they are dispatched to one of the destinations referred to in regulation [35(a)]; and

(ii) are moved in accordance with the conditions specified in regulation 39;

(h) there is an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom;

(i) there is any contravention of, or failure to comply with, any requirement relating to the duty suspension arrangement; or

(j) they are found to be deficient or missing from a tax warehouse."

35. Regulations 8 to 12 of the Regulations prescribe those who are liable to pay the duty when excise goods are released for consumption in accordance with Regulation 6. In each case, the relevant regulation provides that other persons involved or participating in the relevant event are jointly and severally liable to pay the duty with the person who the relevant provision says is responsible for payment. For example, under Regulation 10, the following persons are liable to pay the excise duty when the conditions in Regulation 6(1)(b) are met:

"(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.

(2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1)."

36. Regulation 13 provides, so far as relevant, in relation to excise goods already released for consumption in another Member State which are held for a commercial purpose in the United Kingdom:

> "(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person –
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered."

37. The Regulations recognise that where an excise duty point arises in relation to excise goods which are moved under a duty suspension arrangement by virtue of an irregularity in their movement, it can be difficult to establish when that excise duty point arises. Accordingly, Regulation 80 (2) provides:

> "Where an irregularity occurs in the United Kingdom, the excise goods are released for consumption in the United Kingdom at the time of the irregularity or, where it is not possible to establish when the irregularity occurred, the time when the irregularity is detected or first comes to the attention of the Commissioners."

38. There is a corresponding provision in Regulation 84(2) dealing with irregularities in respect of commercial movements of excise goods from another Member State to the United Kingdom.

39. In interpreting the Regulations, we bear in mind the well-established principle that a national court must interpret domestic legislation implementing a directive, so far as possible, in the light of the wording and purpose of the directive which it seeks to implement: see *Vodafone 2 v HMRC* [2010] Ch 77, as reaffirmed by the Supreme Court in *Swift v Robertson* [2014] 1 WLR 3438.

40. Finally, we were referred to s 154 (2) CEMA which provides that where in any proceedings brought by or against HMRC relating to excise any question arises as to the place from which any goods have been brought or as to whether or not any duty has been paid or secured in respect of any such goods, the burden of proof shall lie upon the other party to the proceedings, namely in this case B & M.

The Decision

41. Before turning to the findings in the Decision, it is helpful to set out the background to the FTT's directions that led to the formulation and hearing of the preliminary issues.

42. Following directions made by the FTT on 20 September 2013, B & M filed Amended Consolidated Grounds of Appeal. In those Grounds, B & M admitted that the relevant excise goods were either produced in the UK or imported into the UK and, except in relation to certain specified goods, had been received by them. They also admitted that the relevant goods were released for consumption in the UK either on their production or importation or subsequently. B & M expressly did not admit that the duty payable on the goods was not paid on or after their release for consumption or subsequently. They also contended that the assessments were made contrary to section 12 A (4) Finance Act 1994 because they were made after the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of HMRC to justify the making of the assessment, came to their knowledge.

43. B & M's primary case was that the excise goods were released for consumption before they were received by B & M on the basis of two alternative hypotheses. The first hypothesis was that, if the goods were not placed under duty suspension arrangements on their production or importation, then they were released for consumption on their production or importation. The second hypothesis was that, if the relevant goods were placed under duty suspension arrangements on production or importation, then those duty suspension arrangements were terminated before the goods were received by B & M. They did not seek to plead when, where or how the goods, on the basis of either of these hypotheses, had been released for consumption.

44. B & M contended that that once goods have been released for consumption there can be no further release for consumption unless those goods are again charged with duty by reason of some further production or some further importation. On the basis that either of the alternative hypotheses applied, since the goods had already been released for consumption before they received them, and duty had become payable by a person with a relevant connection to the goods at the excise duty point so created, no acts of any persons after the time of that excise duty point could result in the creation of a second duty point in respect of the same charge to duty. Consequently, B & M contended, no acts of any persons after the excise duty point could result in a primary liability to pay duty in respect of the excise duty point. As a result, B & M said it was impossible for it to be liable to pay the duty in question.

45. The central point in HMRC's case, as set out in their Amended Consolidated Statement of Case filed on 1 November 2013, was that, at each release for consumption, a separate duty point arises. Since the goods had been found to be held by B & M outside a duty suspension arrangement, with no evidence of duty having been paid on them at production, importation or termination of duty suspension, an excise duty point under Regulation 6 (1) (b) had been established, such excise duty point being capable of arising at any time after the irregular production, importation or release from duty suspension of the goods. Since, having undertaken a check of the supply chain to B & M, HMRC had been unable to trace the goods back to the point of production or importation or release from duty suspension, they remained unsatisfied that duty on the goods had been previously paid under Regulation 6 (1) (a), (c) or (d), and they were therefore entitled to assess B & M for the unpaid duty.

46. Accordingly, following a directions hearing on 16 December 2013, the FTT directed that a preliminary issue should be heard and determined in the light of the positions taken by the parties, as outlined at [41] to [44] above.

47. The directions released by the FTT on 13 January 2014 following the hearing on 16 December 2013 record that HMRC admitted during the hearing:

> (a) that an excise duty point arose pursuant to one of paragraphs (a), (c) or (d) of Regulation 6 (1) before B & M received and/or owned the goods relevant to the appeal; and
>
> (b) that B & M is not liable to pay the duty as a result of the said excise duty point which arose under paragraph (a), (c) or (d) of Regulation 6 (1).

48. The directions hearing therefore proceeded upon the basis that the excise goods in question must, as a matter of principle, have been released for consumption before they were held by B & M by virtue of one of the events identified in Regulation 6 (1) (a), (c) or (d). The hearing did not, however, proceed on the basis that it had been established as a fact when, where or how any such release for consumption had occurred.

49. Consequently, the issues which the FTT directed to be heard as the preliminary issues, as set out at [5] above, were to be determined purely as a matter of principle. In essence, the purpose of the preliminary issues hearing was to determine whether B & M's primary contention that it was legally impossible for it to be liable to pay the relevant duty for the reasons described at [43] above was correct, or, as contended by HMRC, whether an excise duty point can arise under Regulation 6 (1) (b) where HMRC remain unsatisfied that the duty chargeable on the goods following the occurrence of one of the events identified in Regulation 6 (1)(a),(c) or (d) in relation to those goods has been paid.

50. Against that background, we turn to the Decision itself.

51. The FTT's conclusions on the preliminary issues were set out at [89] of the Decision as follows:

> "(i) That there cannot be more than one excise duty point;
>
> (ii) That, after the goods have been released for consumption at an identified point, there cannot be a further release for consumption and therefore the goods cannot be charged again with duty by reason of some further production or further importation;
>
> (iii) That, pursuant to reg 6(1)(b), a person cannot be liable for duty if, before he held the goods, an identified excise duty point arose pursuant to one of regs 6(1)(a), (c) or (d)."

52. The reasons which led the FTT to these conclusions are set out at various points in the Decision.

53. At [54], the FTT held on a reading of the language of Regulation 6 (1)(b) that it envisaged the existence of only a single release for consumption in respect of the same goods:

> "I was urged by both parties to apply the ordinary and plain meaning of the language in the Regulations. HMRC argues that the natural meaning of the language of reg 6(1)(b) reflects a continuous state of affairs. The appellant argues that the use of the definite article represents a "snapshot" in time and therefore a single release for consumption. I pause to observe that the natural and everyday meaning of "release" means to set free, or exempt from charge, the goods (in this context, for consumption or free movement). Once this event has occurred I cannot envisage circumstances in which the said goods could be said to be released, or freed again. For the goods to be released for consumption a second time, third time or repeatedly the goods, by inference, must return to a state of non-release prior to that second or third release."

54. The FTT went on to say, however, that it was also necessary to look for the intention behind the use of the particular language in question. It said this at [55] to [57]:

> "55. The interpretation of legislation involves looking for the intention behind the use of the particular language and considering to what extent that language, as opposed to the principles, should be determinative of the issue. In my view, the language of the 2010 Regulations does not lend itself to a pattern of sequential detention and release and furthermore language which did envisage a repeated chronology of detention and release would be contrary to the purpose of the 2008 Directive which was designed to clarify the point at which excise goods are released for consumption.
>
> 56. I am not persuaded that it would be right to determine the preliminary issues solely on the interpretation of certain words within the 2010 Regulations without considering the provisions as a whole. However if such an approach were correct, that is to say restricted to the meaning of certain words, it appears to me that the appellant makes the stronger argument. The eighth recital of the 2008 Directive makes clear that the purpose of the Directive is to identify *"when ... goods are released for consumption"*. Had it been intended to establish more than one release for consumption (and therefore more than one excise duty point) it seems to me that the 2008 Directive and 2010 Regulations would have used clear and unequivocal language. The 2010 Regulations identify four separate events, each of which constitute a situation whether of long or short duration, that sets the time at which goods are released for consumption. I conclude that each event represents a single event in time. Furthermore I find force in the appellant's argument that as arts 7(2)(a), (c) and (d) of the 2008 Directive and regs 6(1)(a), (c) and (d) of the 2010 Regulation represent specific points in time, it follows that art 7(2)(b) (*"the holding"*) and Regulation 6(1)(b) (*"are held"*) are also intended to identify a point in time.

> 57. It is submitted by HMRC that the words of art 7(2) of the 2008 Directive: *"release for consumption" shall mean <u>any</u> of the following"* (my emphasis) supports the argument that there can be more than one release for consumption. I am not persuaded that this is so. I accept that in applying an everyday meaning, *"any"* could refer to all of the events set out in art 7(2) but I find that it could equally apply to only one event. I note that the 2010 Regulations contain the word *"or"* after reg 6(1)(c) which is not incompatible with the Directive and expressly implies that there cannot be more than one of the separate events which, on occurrence provides for the goods to be released for consumption. The difficulty with any contrary interpretation arises when a second event subsequently occurs which (on HMRC's argument) by reference to the Regulations could constitute a release for consumption."

55. The FTT gave consideration to the circumstances in which Article 7 (2) (b) of the 2008 Directive could apply to give rise to a "release for consumption". The FTT said at [65]:

> "I had in mind the appellant's example of a member of the public who purchases non-duty paid goods from a supermarket, which on the face of it would fall within art 7(2)(b) of the 2008 Directive. However, it seems to me that where an earlier release for consumption is identified, for example by that member of the public evidencing from where the goods were purchased, an earlier point of release for consumption, and therefore excise duty point, arises. By way of comparison I considered the situation whereby goods are imported or manufactured illegally and without duty being paid. If those goods were passed on to another person who was not involved in the illegal activity but was aware of the illegal activity and the fact that duty had not been paid, prima facie there would be a release for consumption due to his holding of the goods, as would be the case for the member of the public. However if, in this scenario, the holder of the illegally imported goods did not identify the source of those goods, then it must follow that his holding of the goods would be the only identifiable point of release for consumption. In construing the provisions in this way, the purpose of collection of taxes is met without a potentially unjust outcome."

56. The FTT went on to say, at [66], that in the absence of any evidence to identify an event under Regulation 6 (1) (a), (c) or (d), Regulation 6 (1) (b) (wrongly referred to as Regulation 7 (2) (b) in the Decision) applies to ensure the collection of tax, a conclusion which the FTT found to be supported by another FTT decision, *Terrance Nolan v HMRC* [2014] UKFTT 240 (TC), a decision which we deal with below. The FTT held at [68] that in *Nolan*, a case involving an assessment on the taxpayer on the basis that he was holding excise duty goods in respect of which duty had not been paid, the FTT identified where the goods were held in order to ensure the collection of tax where "no other (earlier) release for consumption (and therefore duty point) had been identified. In such circumstances a distinction can be drawn between an earlier identifiable release for consumption and no such earlier identifiable event."

57. Finally, the FTT dealt with two cases which were cited to it and which we deal with in more detail below. The FTT did not derive much assistance from the first case, Case C-325/99 *G van de Water v Staatsecretaris van Financien* [2001] ECR I-5163, a judgment of the European Court of Justice, on the basis that the issue whether

there could be more than one release for consumption per Member State was not considered in the case. Nor did the FTT derive assistance from the second case, *Gross v Hauptzollamt Braunschweig* [2014] ECLI: EU: C: 2014:2042, another judgment of the European Court of Justice. The FTT said, at [86] of the Decision, that the general principle to be derived from the judgment in that case is that any person who holds goods which have been released for consumption in one Member State and are held by him for a commercial purpose in a second Member State can be held liable to pay excise duty, even if he was not the first holder of those products in the second Member State. Accordingly, the FTT held at [88] that *Gross* must be confined to its facts in that it addressed the situation where goods had already been released for consumption in one Member State and were held for a commercial purpose in another. The FTT said that the case was not authority for the proposition that the second or third holder of goods is liable to duty on the basis that there is deemed to be a second or third release for consumption by each of those subsequent holders.

58. Looking at the way the FTT has expressed its conclusions at [89] of the Decision and its reasoning for those conclusions earlier in the Decision, in relation to the wording of the preliminary issues themselves, it would appear that it has concluded that:

> (1) There cannot be more than one excise duty point under the Regulations, but an excise duty point does not arise until it has been "identified";
>
> (2) Goods are not released for consumption until the point at which they have been so released has been "identified", and once they have been so identified there cannot be a further release for consumption; and
>
> (3) A person holding excise duty goods in respect of which duty has not been paid cannot be liable to the duty on those goods if, before he held the goods, the occurrence of an event falling within any one of paragraphs (a), (c) or (d) of Regulation 6 (1) has been "identified".

The FTT seems to have used the word "identified" in the sense that evidence establishes how, where, when and through whose agency the relevant event occurred. This appears to be the case because of its reliance on *Nolan,* where the appellant was assessed on the basis that HMRC had not identified an earlier duty point before he was found to be holding the goods.

59. It therefore appears that the FTT has decided the preliminary issues on a different basis to that argued by either of the parties. HMRC had prior to the hearing admitted that an excise duty point must have arisen pursuant to one of paragraphs (a), (c) or (d) of Regulation 6 (1) before B & M received the goods. Their primary submission before the FTT, as recorded by the FTT at [37] of the Decision, was that it was apparent from the wording of the Regulations that every product on which excise duty is payable will be released for consumption when one of the circumstances set out in Regulation 6 (1) (a), (c) or (d) occurs, with the consequence that Regulation 6 (1) (b) must result in a release for consumption occurring at a time or following an event other than those identified in Regulation 6 (1) (a), (c) or (d). HMRC submitted that the only sensible construction is that the release for consumption under Regulation 6(1)(b) occurs at a time when goods are held and the duty due by virtue of

the occurrence of any prior release for consumption has not been paid, citing *Nolan* in support.

60. The FTT rejected this analysis at [68] in the following terms:

> "I do not agree; as I interpret *Nolan*, the 2010 Regulations were construed in a manner by which it was identified where the goods were held in order to ensure the collection of tax where no other (earlier) release for consumption (and therefore duty point) had been identified. In such circumstances a distinction can be drawn between an earlier identifiable release for consumption and no such earlier identifiable event."

It is apparent from this passage that the FTT has concluded that, in the absence of an earlier excise duty point having been identified, where a person is found to be holding goods in respect of which the duty has not been paid the excise duty point has arisen by virtue of such holding and that is the only excise duty point which has arisen. This analysis appears to us to underpin the conclusions at [89] of the Decision.

61. It therefore follows that the FTT also rejected B & M's submissions, based purely on an analysis of the language of the Regulations, that once an (unidentified) release for consumption has occurred in a Member State there cannot be another one. That is apparent from [56] of the Decision, as set out at [53] above.

Grounds of Appeal and issues to be determined

62. On 28 January 2015 Judge Blewitt granted HMRC permission to appeal on the following four grounds advanced by HMRC:

> (1) The FTT wrongly considered HMRC were seeking to enforce an excise assessment in circumstances where there had been two or more excise duty points established by HMRC. In fact, HMRC assessed B & M for excise duty on the basis of the only excise duty point they were able to establish on the facts before them. The recognition by HMRC that another excise duty point must, in principle, have been triggered should not have been treated as a basis in law for concluding that HMRC could not establish an excise duty point under Regulation 6(1)(b);
>
> (2) The FTT wrongly treated the excise goods in issue as being in principle subject to an excise duty point even though, on the facts of this case, neither HMRC nor the FTT were able to establish to an appropriate standard of proof exactly where the excise goods in issue had irregularly departed from duty suspension arrangements. The FTT erred in failing to recognise that the existence of a particular status for the goods, namely their "release for consumption", depended on proof of that status being available;
>
> (3) Alternatively, to the extent that two or more excise duty points were in principle identifiable on the facts before the FTT, it should not, in law, have deprived HMRC of the ability to raise an excise assessment against B & M pursuant to Regulation 6 (1) (b); and

(4) The FTT erred in failing to find that B & M was capable in law of being a person liable to pay the excise duty on the excise goods, pursuant to Regulation 10.

63. Although Judge Blewitt granted permission to appeal, at [11] of her decision notice she stated:

> "No evidence was called and no findings of fact were made. The decision was confined to legal points raised at the preliminary issues hearing. I did not consider as part of the decision the establishment or otherwise by HMRC of an excise duty point. The background was set out to provide the context for the preliminary issues and was based upon the facts as presented in the form of skeleton arguments submitted by both parties and in respect of which there was no dispute. Similarly no findings of fact were made as to whether the appropriate standard of proof was established or with whom any liability rests."

64. This statement is consistent with our analysis of the Decision at [58] to [61] above. We are therefore of the view that HMRC's grounds of appeal are based on a misapprehension of the Decision. We cannot find anything in the Decision that constitutes any finding of fact beyond the background facts which we summarise at [2] to [4] above. In particular, there are no findings in the Decision to the effect that HMRC were seeking to enforce an excise assessment in circumstances where they had established two or more excise duty points. There was no finding that any particular excise duty point had been "established" (which we take to mean "identified" in the sense of how we understand that term was used by the FTT in the Decision) prior to B & M having received the goods. What the FTT appeared to find (by implication, because it did not say so expressly) was that on the basis of its reasoning that an excise duty point would arise in the absence of any earlier excise duty point having been "identified" then it would be possible to assess B & M under Regulation 6 (1) (b). What it did not determine, however, was whether any such earlier excise duty point had been identified. As Judge Blewitt recognised in her decision on the application for permission to appeal, that would be a matter to be established at the substantive hearing before the FTT and we do not believe that she strayed into that territory in any respect in the Decision.

65. It seems therefore that, paradoxically, the FTT did in fact accept the basis on which HMRC appeared to be arguing their case in the grounds of appeal, namely that in the absence of the establishment of an earlier excise duty point B & M could be assessed to duty on the basis that it was holding goods in respect of which duty had not been paid. As regards HMRC's third ground of appeal, we do not read [65] of the Decision as a finding that two or more excise duty points were "identifiable" on the facts before the FTT. On the contrary, its finding was that if a person's holding of goods in respect of which duty had not been paid was the only "identifiable" point of release for consumption, then he could be assessed for the outstanding duty.

66. If the FTT had made the findings that HMRC contend that it had, that would have been determinative of the whole appeal and we would expect the FTT to have said so at the end of the Decision.

67. In the circumstances, the approach we have taken in considering this appeal has been to deal with the competing arguments as put before us. We think that the competing positions can be summarised as follows:

(1) HMRC contend that the recognition by them that other excise duty points must, in principle, have been triggered prior to B & M receiving the goods did not preclude them from assessing B & M for excise duty in respect of the goods pursuant to Regulation 6 (1) (b) of the Regulations, because there was no satisfactory evidence before HMRC which established any earlier event such as to ground an assessment based on Regulations 6 (1) (a), (c) or (d).

(2) B & M contend that excise duty becomes chargeable on particular excise goods only once in a particular Member State, although by virtue of Article 33 it can be charged in two different Member States. Excise duty becomes chargeable only when goods have been released for consumption, and such a release can only occur on one occasion in any one Member State. Once the goods have been released for consumption that is the time excise duty becomes payable at one of the four excise duty points prescribed by Regulation 6. Once one of those four excise duty points has occurred, regardless of whether it can be established when, how, where and by whose agency such an event occurred, there is no scope for any further excise duty point because the goods have already been released for consumption.

Submissions

68. Mr Beal's submissions can be summarised as follows.

69. HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before them to assess any other person as liable for excise duty by virtue of any earlier excise duty point that may have occurred. Such an assessment would be made on the basis that the holding of the goods in such circumstances amounted to a "release for consumption" thus triggering an excise duty point. That phrase is a term of art and should not be interpreted by reference solely to its natural and everyday meaning.

70. National customs authorities should be given a margin of discretion when making evaluative judgements in specialised areas of law and policy. Mr Beal accepts that, if HMRC are correct in their contentions, it follows that any person holding excise duty goods in circumstances where he cannot provide evidence that the relevant duty on them has already been paid could in principle be assessed to duty in respect of those goods if HMRC have not been able to establish an earlier excise duty point. However, dealing with the example of a member of the public who is in possession of a quantity of wine which he purchased from a retailer and where excise duty had not been paid on those goods, that member of the public would be able to provide evidence that would show there had been an earlier excise duty point and release for consumption as a result of the prior holding of the goods by the retailer,

and HMRC's policy in that situation would be to assess the retailer and not the member of the public.

71. The meaning of the phrase "release for consumption" includes not only the act of making the products available for consumption, but diverting them to the domestic market through an irregular departure: see *Greenalls Management Ltd v HMRC* [2005] UKHL 34. It is the fact that excise goods are capable of being sold in the domestic market in competition with other domestic excise goods (on which excise duty has been paid) which drives the correct teleological construction of Article 7 (2) of the 2008 Directive. Where there is an irregularity in a duty suspended movement, there will be a release of the goods for consumption and the Member State in which the irregularity is detected will be the competent Member State to assess for excise duty, unless it is possible to determine with precision where the irregularity occurred. By parity of reasoning, it was entirely appropriate for HMRC to assess B & M for the unpaid excise duty, since that is where the irregularity in any duty suspended holding of the excise goods was detected. Regulation 10 (1) operates to make B & M liable to pay the excise duty in this case because it was holding the excise goods at the time when they were released for consumption by virtue of being held by B & M outside a duty suspended arrangement.

72. Excise duty is a tax on consumption, so duty must be assessed by reference to the first point at which it has been established goods have been released for consumption. B & M has the protection of the contractual warranty from its vendor that duty had been paid on the goods.

73. If B & M's contentions were correct, in effect Regulation 6 (1) (b) would be a "dead letter" and would only apply in extremely limited circumstances where goods had been held without duty having been paid by virtue of one of the exemptions in Article 12 of the 2008 Directive and that exemption later ceased to apply, with the result that an excise duty point then arose by virtue of the holding of the goods in question.

74. Furthermore, if B & M's contentions were correct an impossible burden would be placed on HMRC. Many excise duty transactions will have commenced with an importation of excise goods in another Member State, since the United Kingdom manufactures low volumes of certain excise products such as wine. It would follow from B & M's interpretation of the 2008 Directive that HMRC could only impose excise duty on the importation of certain products, since it would be obliged to acknowledge that the absence of domestic production must mean that the goods were at some time imported. If HMRC were simply not able to establish how or when a quantity of wine was imported, the products would have to go untaxed, even though the trader holding them was unable to show duty had been paid and had taken no steps at all to ensure that only duty paid products were purchased. Such reasoning would run clear counter to the objective of the Directive to ensure that duties are properly charged and collected, and would run counter to the reasoning of the European Court of Justice in *van der Water*.

75. The 2008 Directive does not require that a national customs authority can only select an excise duty point that is the earliest conceivable one, regardless of whether or not it has the evidence to establish how or when such a point arose. Just as HMRC are able to exercise a discretion as to which of several excise duty debtors should be assessed (based on the evidence before them) so should HMRC be entitled to decide, exercising a discretion consistently with their statutory obligations and public law principles, which of several excise duty points is appropriate. That will be based on the facts and evidence before them and HMRC are entitled to a margin of discretion in their selection of the appropriate duty point. If B & M were correct, there would be a de facto obligation on HMRC to conduct an extensive investigation in order to determine the earliest point in a chain of transactions at which goods were held duty unpaid. Such an obligation would not be consistent with the EU law principle of proportionality. Nor would it be consistent with the decision of Parliament to impose the burden of proving that duty has been paid on the person who holds dutiable goods: see s 154 (2) CEMA. Nevertheless, where subsequent to an assessment evidence establishes an earlier excise duty point, HMRC would make a further assessment on the basis of that earlier excise duty point and rebate the duty previously paid.

76. If B & M's arguments were correct, the practical consequence would be to exempt a swathe of wholesalers and retailers of excise goods from the payment of excise duty on goods which they hold so long as they can merely establish that they neither imported those goods nor manufactured them. The comprehensive non-imposition of excise duty once excise goods are in free circulation within a Member State is not something which either the 2008 Directive or the Regulations, properly construed, countenance or endorse.

77. HMRC seek to answer the point that their approach means that taxes are imposed by administrative action through the exercise of their general policy by contending that they are following the principles of EU law laid down in *van de Water,* which the UK is obliged to follow.

78. Mr Baldry's submissions can be summarised as follows.

79. The essential question is whether there can be more than one release for consumption per Member State in respect of the same goods. B&M submits that excise duty becomes chargeable on excise goods only once per Member State. There is a three stage approach to the charging and collection of excise duty, as follows. First, there is only one excise duty, charged on excise goods under ALDA, and it is imposed under that legislation in respect of beer and wine as and when the products concerned are imported into, or produced in, the United Kingdom. Secondly, however, the 2008 Directive makes provision for goods subject to excise duty to be chargeable only when they are released for consumption and the relevant rate of duty is fixed at that time. Finally, the excise duty which has become chargeable is collected in accordance with the domestic legislation of the Member State concerned.

80. The notion that the same duty becomes chargeable on the same goods more than once is contrary both to principle and to the language of the Regulations. As a matter of ordinary construction the words of the Regulations are clear. The excise duty point

arises “at the time when” the goods are released for consumption: see Regulation 5. Regulation 6 then specifies four events which constitute “release for consumption”. Thus, when excise goods are released for consumption on the occurrence of one of those four events, the excise duty point is fixed.

81. It follows that, if particular excise goods have been released for consumption because one of the four events has occurred, the excise duty point is triggered in respect of those goods. There is no scope for a subsequent excise duty point to arise. Put another way, once goods have been “released for consumption” they cannot be released for consumption again (because they have already been released for consumption). That is the obvious ordinary meaning of the words.

82. Moreover, the existence of multiple excise duty points arising in respect of the same goods is inconsistent with the basic purpose and framework of the 2008 Directive. Its main aim is to have a single set of rules for determining the moment at which duty becomes payable, in particular so as to avoid a situation in which duty could be levied definitively on the same goods in different countries.

83. Specifically, the purpose of the 2008 Directive is to ensure that there is a “release for consumption” (so that excise duty becomes chargeable) when there is a departure of goods, including an irregular departure, from a duty suspension arrangement: see Article 7(2)(a). The 2008 Directive makes it clear that the mere holding of excise goods outside a duty suspension arrangement is not a release for consumption if excise duty has already been levied (i.e. the duty has become chargeable) on the goods in question: see Article 7(2)(b). The reference to “levied” in Article 7(2)(b) plainly means the excise duty becoming chargeable under domestic law (as opposed to the collection of that duty by the national authorities). The 2008 Directive is careful to distinguish between the separate concepts of duty being “levied” and “collected”: see for example Article 9.

84. The 2008 Directive includes “the holding of excise goods outside a duty suspension arrangement” within the definition of “release for consumption”, but, as noted above, only where excise duty has not previously been levied on the goods. This makes it clear that the 2008 Directive is not intended to impose multiple excise duty points.

85. Article 7 (2) (b) of the 2008 Directive is only intended to cover situations where excise duty goods have previously been exempt pursuant to one of the exemptions in Article 12 and thereafter cease to be exempt. This is supported by a Note from the EU Presidency regarding a draft of the 2008 Directive which explains that the provision was included with respect to goods that are exempted from excise duty but not used in accordance with the purposes for which they were granted exemption.

86. Although Article 33 of the 2008 Directive makes provision for excise duty goods to become liable to duty in more than one Member State this scenario does not support HMRC’s case. This is for two reasons. First, the products are not charged to duty more than once in either Member State. Secondly, there is a right to remission or

reimbursement of the duty chargeable or paid in the first Member State. There is only one effective release for consumption in the EU.

87. If HMRC's interpretation is correct, there will be a charge to duty more than once in a Member State (i.e. more than one release for consumption); and there will be no right to reimbursement of the duty chargeable and paid, deferred or owed by reason of the first release for consumption. On HMRC's case, there will be more than one effective release for consumption in the EU. Regulation 13, which implements Article 33 of the 2008 directive, is consistent with the Directive in imposing a single excise duty point in the UK.

88. Regulations 8 to 12 specify in respect of each one of the four circumstances of "release for consumption" the person or persons who is or are liable to pay the excise duty at the excise duty point which has become chargeable under that specific head, and whether the liability is joint and several. The Regulations do not, however, specify that a person who is liable to pay the duty by virtue of one of the four circumstances under Regulation 6 is jointly and severally liable with a person who is liable to pay the duty by virtue of any one of the other circumstances. This is consistent with the power given in the enabling legislation. Section 1 (4) of the 1992 Act only permits joint and several liability to arise in respect of the same category of excise duty point in respect of which the primary liability arises; so, for example, B & M cannot be jointly and severally liable in respect of duty which is chargeable on a prior excise duty point having arisen. This is consistent with there being only one chargeable event in a Member State.

89. In the present case, HMRC have not disclosed evidence that the duty has not been paid. Instead, they seek to rely on B & M's difficulty in obtaining remote supply chain information to prove payment, in circumstances where HMRC have refrained from providing the information that B & M has requested in order to enable it to investigate.

90. HMRC have not disclosed evidence of an investigation that went further than an examination of the invoices of earlier suppliers in B & M's supply chains and an internal inquiry as to whether earlier suppliers were deregistered. They have not disclosed any evidence of an investigation that went further than the identification of so-called "missing traders". HMRC have therefore not implemented their claimed policy of assessing the earliest liable person. They have not assessed the earlier suppliers in B & M's chains that they identified.

91. To construe the Regulations so as to allow HMRC to have a complete discretion as to who is liable to pay the duty (as HMRC suggest) would run against the well-established principle stated by Lord Wilberforce in *Vestey v IRC* [1980] AC 1148 at 1172 E:

> "A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability is to be decided (even though within a limit) by an administrative body, represents a radical departure from constitutional principle…"

The legislation would need to be very clear for such powers to be given to HMRC and it is clear that the Regulations do not give HMRC a discretion to impose multiple charges under Regulations 8 to 10.

Authorities

92. Mr Beal relied on a number of European and domestic authorities in support of his submissions. The European authorities are judgments of the European Court of Justice, now the Court of Justice of the European Union, which for convenience we refer to as the "ECJ".

93. The first case was *van de Water*, which we refer to at [57] above. The relevant facts were that Mr van de Water had acquired from a third party at least 2000 litres of pure alcohol which he used in order to manufacture gin with the help of others in a rented shed. None of these products, which were subject to excise duty, were covered by customs documents, nor was the shed authorised for use as a tax warehouse. Mr van de Water was assessed for excise duty in respect of both the gin and the pure alcohol found in the shed. The basis of the assessment under the relevant Netherlands law was that he had infringed the law by manufacturing and holding goods subject to excise duty on which that duty had not been charged, and his appeal was dismissed on the grounds that he had not produced any evidence showing that the excise duty had been paid.

94. There was a reference to the ECJ of the question whether the mere holding of a product subject to excise duty could be regarded as a release for consumption, if and insofar as duty had not already been levied on it pursuant to the applicable provisions of Community law and national legislation.

95. This case predated the 2008 Directive and accordingly the relevant Community law was to be found in the 1992 Directive. The terms of the charging provisions, contained in Article 6(1) of the 1992 Directive, were broadly equivalent to those contained in Article 7 (2) of the 2008 Directive except in one important respect. Article 6 of the 1992 Directive did not contain the equivalent of Article 7 (2) (b) of the 2008 Directive and accordingly there was no specific provision that the holding of excise goods outside a duty suspension arrangement where excise duty had not been levied in itself amounted to a release for consumption.

96. It was also the case that the 1992 Directive, unlike the 2008 Directive, did not contain provisions determining the person from whom the duty should be claimed, which therefore fell to be determined under national law. The ECJ referred to this point at [28] of its judgment in the following terms:

> "The Commission, for its part, observes that Article 6 (1) of the Directive is designed to establish the point in time at which the excise duty becomes actually chargeable, and not to determine the person from whom the duty should be claimed. According to the Commission, where a product subject to excise duty on which that duty has not been levied is located outside the closed circle of tax warehouses, and thus outside a suspension arrangement, it necessarily follows that that product must at some point have been manufactured or imported outside

such an arrangement or have departed irregularly from such an arrangement. Once it is established that duty is chargeable, it is for the Member States to determine, in accordance with Article 6 (2) of the Directive, how the duty is to be levied and, in particular, from whom it is to be claimed."

97. The Court also observed at [29] that products subject to excise duty become taxable upon their production within the territory of the Community or importation into that territory. However, as the Court observed at [30], they do not become chargeable to excise duty until released for consumption, as defined by Article 6 (1) of the Directive, the Court recognising at [31] that in general a period of time elapses between the occurrence of the taxable event (the production or importation of the goods) and the point at which the excise duty becomes chargeable, the intervening period being a duly regulated suspension arrangement.

98. Accordingly, the question for the ECJ was whether Article 6 (1) of the 1992 Directive was to be interpreted as meaning that the mere holding of a product subject to excise duty constituted a release for consumption where that duty had not yet been levied in accordance with the applicable provisions of Community law and national legislation.

99. The ECJ decided that the holding of goods in circumstances where duty had not been paid could amount to a release for consumption. Its reasoning was set out at [34] to [36] of its judgment as follows:

> "34. As the Netherlands Government and the Commission have pointed out, it is clear, first, from the scheme of the Directive and, second, from its provisions concerning the definition and operation of tax warehouses and suspension arrangements… that a product subject to excise duty which is held outside a suspension arrangement must at some point and in some way have been released for consumption within the meaning of Article 6 (1).
>
> 35. Article 6 (1) of the Directive in fact provides that the term "release for consumption" covers not only any manufacture or importation of products subject to excise duty outside a suspension arrangement but also any departure, including irregular departure, from such an arrangement. By placing such a "departure" on the same footing as a release for consumption within the meaning of Article 6 (1), the Community legislator has clearly indicated that any production, processing, holding or circulation outside a suspension arrangement gives rise to the chargeability of the excise duty.
>
> 36. In those circumstances, once it is established before the national court that such a product has departed from a suspension arrangement without the excise duty having been paid, it is clear that the holding of the product in question constitutes a release for consumption within the meaning of Article 6 (1) of the Directive and that the duty has become chargeable."

100. Having observed again at [38] that it is the responsibility of the Member State concerned to lay down the procedures for the levying and collection of the excise duty, including provisions determining who is liable to pay the excise duty which has become chargeable following a release for consumption, the court said at [41]:

> "Lastly, it should be noted that, whilst Article 6 of the Directive does not specify the person liable to pay the duty chargeable, it follows from the scheme of the Directive, and from the ninth recital in its preamble, that the national authorities must in any event ensure that the tax debt is in fact collected."

101. Mr Beal submits that in this case the ECJ expressly recognised that where goods are held outside a duty suspension arrangement, there must logically have been some prior release for consumption as a matter of principle. The Court recognised that where those duty suspension arrangements end, or where there is non-compliance, the duty is no longer suspended and becomes payable. In those circumstances, the Court held that the holding of excise duty goods in respect of which duty had not been paid was itself a release for consumption and, in accordance with the reasoning at [41] of the judgment, it would be the duty of the authorities of the Member State in question to collect the duty that was due from whoever, under the local law, was liable to pay it. Accordingly, it follows from the Court's judgment that the natural (but inferred) existence of a prior release for consumption of the excise goods in that case did not preclude the existence of a charge to excise duty arising merely from the holding of the goods.

102. Mr Baldry observes that the basis of the decision in *van de Water* was that, despite the absence of a specific provision specifying the holding of goods as a release for consumption, the Court reasoned that since a release for consumption included any irregular departure from a suspension arrangement, the holding of goods must be encompassed within "release for consumption". The 2008 Directive expressly includes the holding of excise goods outside a duty suspension arrangement as a release for consumption, but only where excise duty has not previously been levied on the goods. In Mr Baldry's submission, this makes it clear that the 2008 Directive is not intended to impose multiple excise duty points, and this is entirely consistent with the scheme of the 1992 Directive, as interpreted by the Court in *van de Water*, where in the first line of [28] it specifically referred to "the point in time at which the excise duty becomes chargeable."

103. Mr Baldry also observes that the Court did not deal with the question whether there could be a second release for consumption of the same goods. The essence of the judgment was that the holding of goods outside a suspension arrangement was an example of the goods having left the suspension arrangement. He referred us to [45] of the Advocate General's opinion, which noted the Commission's concerns that the assessment, in so far as it was based on the holding of alcoholic raw materials, was made on Mr van de Water and not on the person who sold him those raw materials and who, in the final analysis, was the one who illegally caused those raw materials to depart from the suspension arrangement. As the Advocate General observed, that was a decision taken by the Netherlands tax authorities in accordance with local law. It was not the subject of the question referred to the Court, and should therefore not receive its attention.

104. In our view, [34] of the judgment can be read as an implicit recognition by the Court that there had been an earlier release for consumption before Mr van de Water took possession of the goods. The paragraph is, however, equally consistent with a

finding that the mere fact of the holding of the goods by Mr van de Water outside a duty suspended arrangement was clear evidence that the goods had left such an arrangement and were therefore chargeable to duty. The question of who was to be chargeable was a matter for the national authority to determine according to the terms of its domestic law. However, the ECJ was in no doubt that it was the duty of the national authority to ensure that the duty was paid, and that objective clearly could not be achieved in a situation where the earlier intervention of a person (other than the person holding the goods) which caused the termination of the suspension arrangement could not be established. The case therefore offers strong support for Mr Beal's submission that it can be inferred that both Directives envisage that a person who is found to be holding goods in respect of which excise duty has not been paid can be held liable for the duty in circumstances where it has not been possible to establish when, how, where or by whose agency an earlier release for consumption took place. This is also consistent with the following statement by the Advocate General at [40] of his opinion in *van der Water,* which in our view is reflected at [36] and [41] of the ECJ's judgment:

> "It was the intention of the Community legislature that no product subject to excise duty should be present on Community territory outside a suspension arrangement unless excise duty had been paid. Accordingly, under the directive, the mere holding of a product in such circumstances makes duty chargeable."

105. We do not accept Mr Baldry's submission that the position is different under the 2008 Directive because Article 7 (2) (b) of that Directive only applies "where excise duty has not been levied". In our view, as we observed at [26] above, Article 9 of the 2008 Directive draws a distinction between excise duty having become "chargeable" which, as provided by Article 7 (1), occurs at the time of release for consumption, and that duty being "levied and collected". In our view this indicates that "levied" is here to be regarded as a synonym for "assessed", and clearly there cannot be an assessment unless the person to be assessed can be identified. This cannot happen, in relation to a release from suspension occurring prior to a person holding the goods, where there is no evidence as to how, where, when and by whose agency the release from suspension occurred. In that situation it appears to us that excise duty may have become "chargeable", but it clearly has not been "levied". This is therefore consistent with a scheme that permits an assessment to be made on a person holding excise duty goods outside a duty suspension arrangement, where excise duty has become chargeable as a result of the termination of that arrangement but has not been assessed because of the lack of evidence as to the circumstances of that termination. Although *Van de Water* did not deal specifically with the question whether there could be more than one release for consumption of the same goods in the same Member State, in our view the reasoning in the case is consistent with that possibility arising. In our view it is also implicit in the reasoning that there can be no more than one assessment to duty in respect of the same goods.

106. In the second case on which Mr Beal relies, Case C-175/14 *Ralph Prankl*, ECLI: EU: C: 2015:142, the ECJ ruled that smuggled cigarettes, unlawfully introduced into the territory of the EU in one Member State, should be assessed for excise duty in the Member State to which they were subsequently smuggled. They

had been held for commercial purposes in the Member State of destination and were also discovered there. That enabled the Member State of destination to charge excise duty on the basis that the cigarettes were held for commercial purposes in that Member State, even though they had already been held for commercial purposes in another Member State, through which they had passed in transit to the Member State of destination. Mr Beal submits that this approach is consistent with the approach that HMRC have taken in relation to B & M in this case, which is to assess B & M notwithstanding any prior release for consumption that may have occurred.

107. In our view, however, *Prankl* does not assist us in this case. The ability of the Member State of destination to charge excise duty arose by virtue of the provisions which are now in Article 33 of the 2008 Directive, that is where goods which have been released for consumption in one Member State are held for commercial purposes in a second Member State. The right to assess did not arise in circumstances where there had been more than one release for consumption. The essence of the case was that the goods could not be assessed for duty in the Member State of transit, when they were discovered by the authorities of another Member State in the territory of which they were held for commercial purposes: see [26] of the judgment.

108. Similarly, we have derived no assistance from Case C-2304/08 *Dansk Transport og Logistik* [2010] ECR I-3799, another judgment of the ECJ cited to us by Mr Beal, where one of the questions to be determined was whether goods which had been unlawfully introduced into the European Union in Germany, but were subsequently transported into Denmark and seized and destroyed by the Danish authorities, could be assessed to excise duty in Denmark. Again, the ECJ held that the goods should be assessed in Denmark by virtue of the provisions which are now contained in Article 33 of the 2008 Directive. We do not think that this case supports HMRC's contention that a discovery by the relevant authority of goods in respect of which no duty has been paid entitles that authority to levy excise duty notwithstanding an earlier release for consumption.

109. Mr Beal relies on the ECJ's judgment in Case C-64/15 *BP Europa SE* [2016] ECLI: EU:C: 2016:62 to support his submission that the term "release for consumption" should be interpreted in context and taking account of its purpose. In that case a large quantity of gas oil (which is a product subject to excise duty) was moved from a tax warehouse in the Netherlands to a tax warehouse in Germany under a duty suspension arrangement. On delivery, the owner of the tax warehouse in Germany found that the amount received was significantly less than that stated on the electronic administrative document which accompanied the load.

110. The ECJ referred to excise duty being a tax on consumption in the following terms at [32] of its judgment:

> "Furthermore, since excise duty is a tax on consumption, as stated in recital 9 of directive 2008/118, based on the amount of goods offered for consumption, the point at which the duty becomes chargeable must be fixed in such a manner that the amount of goods concerned can be measured precisely. In the light of that objective, Article 20 (2) of that directive, by stating that the movement of excise goods under a duty suspension arrangement ends when the consignee has taken

> delivery of those goods, must be interpreted as meaning that that taking delivery must be regarded as occurring when the consignee is in a position to know precisely what quantity of goods he has actually received."

111. Accordingly, the fact that there was a shortage of goods on delivery meant that there had been a "release for consumption" of that portion of the load which had not been delivered. The ECJ said at [43] of its judgment:

> "The finding of shortages on delivery of excise goods under a duty suspension arrangement reveals a situation which is, of necessity, in the past where the missing goods did not form part of that delivery and the movement of which did not, accordingly, end in accordance with Article 20 (2) of directive 2008/118. In consequence, that situation constitutes an irregularity within the meaning of Article 10 (6) of that directive. An irregularity of that type of necessity gives rise to a removal from the duty suspension arrangement and, as a result, a release for consumption as presumed under Article 7 (2) (a) of that directive."

112. We agree with Mr Beal that this is an example of the ECJ giving a purposive construction to the term "release for consumption." We also agree that the case is an example of an excise duty point having been established in circumstances where the national customs authorities were unable to establish with certainty where the irregular departure from the duty suspension arrangement took place. In those circumstances, in accordance with the provisions of Article 10 (2) of the 2008 Directive, the irregularity was deemed to have occurred in the Member State in which, and at the time when, the irregularity was detected: see [37] and [38] of the judgment.

113. Mr Beal seeks to derive assistance from *Gross*, a judgment of the ECJ that we have referred to briefly at [57] above. The facts were that Mr Gross had repeatedly taken delivery of cigarettes which had been smuggled into Germany and in respect of which excise duty had not been paid in order to resell them. The cigarettes had been brought from another Member State into German territory for commercial purposes outside a suspension arrangement. Mr Gross had obtained the products from other persons after those products had been unlawfully brought into Germany, and the question for the ECJ was whether Mr Gross could be assessed for duty even though there had been prior holders of the goods in Germany. The relevant provision to be interpreted was Article 7 of the 1992 Directive, which made provision for products subject to excise duty already released for consumption in one Member State but which were then held for commercial purposes in another Member State to be assessed to excise duty in the second Member State. Article 7 (3) of the 1992 Directive provided that the duty should be due from, among others, "the person making the delivery or holding the products intended for delivery or from the persons receiving the products for use in the [second] Member State".

114. The ECJ held that Mr Gross could be assessed as a person who received the products in question, notwithstanding that there had been previous holders of the goods in Germany. Its reasoning was set out at [25] and [26] as follows:

> "25. In particular, in expressly providing that the person "receiving the products" at issue may be liable to excise duty on products subject to that duty released for consumption in a Member State and held for commercial purposes in another Member State, Article 7 (3) of Directive 92/12 must be interpreted as meaning that any holder of the products at issue is liable to excise duty.
>
> 26. A more restrictive interpretation, to the effect that only the first holder of the products at issue is liable to excise duty, would defeat the purpose of Directive 92/12. Under that directive, the movement of products from the territory of one Member State to that of another may not give rise to systematic checks by national authorities, which are liable to impede the free movement of goods in the internal market of the European Union. Consequently, such an interpretation would render more uncertain the collection of excise duty due upon the crossing of an EU border."

115. We accept that the ECJ's reasoning here supports the purpose behind both the 1992 Directive and the 2008 Directive, namely that it is the duty of national authorities to ensure that excise duty is levied and paid where goods in respect of which duty has not been paid are found to be circulating within the EU. Otherwise, there will be a distortion of the internal market if goods in respect of which duty has not been paid are circulating freely alongside goods where duty has been paid. On that basis, in *Gross* the purpose of the directive was served by assessing Mr Gross to the outstanding duty as he had clearly been identified as a person who had received and held the goods, notwithstanding the fact that others had so held them before him and might, in principle, have also been assessed.

116. We accept that this case does not deal with the question whether there can be more than one release for consumption of the same goods in a single Member State, or whether the prior occurrence of such an event in principle precludes an assessment against a person holding the goods in circumstances where duty has not been paid. Both Article 7 of the 1992 Directive and Article 33 of the 2008 Directive only apply in circumstances where there has been a prior release for consumption in another Member State. The basis of chargeability to excise duty in the second Member State is that a person in that Member State is either delivering, holding or receiving the goods in circumstances where the duty has not been paid. In those circumstances, the national authorities can assess to duty whoever they find to be in that position at the relevant time, notwithstanding the fact that somebody else had previously also been in that position.

117. There is also a clear difference in how the chargeability provisions of Article 7 and Article 33 are expressed. Article 7 provides that excise duty becomes payable by reference to the occurrence of one of four specified events, and Article 8 then prescribes who in relation to the event in question is liable to pay the duty. Under Article 33, by contrast, there is only one specified event giving rise to chargeability, namely the holding of goods for commercial purposes in a second Member State, but, as held in *Gross*, after that event any person who is found to have been holding, delivering or receiving the goods is liable to be assessed for the outstanding duty.

118. Nevertheless, in our view *Gross* provides clear authority that once excise goods in respect of which duty has not been paid are circulating within the Member State of their destination then the authorities of that Member State have the ability to choose which of sequential holders of the goods to assess, provided that there has not been a prior assessment. This is consistent with the underlying policy of the 2008 Directive, as we have previously identified, that it is the duty of the Member State concerned to ensure that duty is paid on goods that are found to have been released for consumption. The decision in the case is therefore consistent with the principle that it should be possible to assess a person found to be holding goods in respect of which duty has not been paid, even though there may have been a prior release for consumption of those goods within the same Member State, so long as there has been no prior assessment of the outstanding duty. We do not necessarily see why that approach should be invalid merely because the right to assess arises by virtue of Article 7 rather than Article 33.

119. We were referred to only one domestic authority dealing with the interpretation of Regulation 6 (1), namely *Nolan*, which we refer to briefly at [56] above. Mr Nolan was assessed for excise duty on a large quantity of cigarettes and hand rolling tobacco. The basis for the assessment was that the products concerned were duty unpaid and Mr Nolan was the person physically holding and controlling them. The assessment under appeal had in fact been reduced because an earlier duty point was identified in relation to some of the products.

120. Mr Nolan was found to be holding the products as a result of HMRC following a van carrying them from Heathrow airport to Mr Nolan's home, where the products were subsequently found.

121. The FTT's decision in Nolan seems to have been made on the basis that it was common ground that HMRC were entitled to assess Mr Nolan, having not "identified" an earlier excise duty point. At [27] to [29] of the decision the FTT made findings of fact as to whether HMRC could have identified an earlier duty point and concluded that they could not, but it does not appear that there was any argument before the FTT as to whether the occurrence of any of the events in Regulation 6 (1) (a), (c) or (d) precluded the assessment of Mr Nolan. The only reference to the legal basis for the assessment on Mr Nolan is to be found at [33] of the decision, after the FTT had set out the text of Regulation 6 at [32]. The FTT said at [33]:

> "In this case, there was no suggestion that the goods the subject of the assessment had ever paid excise duty. Far from it, Mr Nolan had pleaded guilty to harbouring goods on which duty had not been paid. Therefore, if no earlier duty point had arisen, the goods were subject to duty under (b) above as, when present at Mr Nolan's home they were "outside a duty suspension arrangement" and duty had not been paid."

122. *Nolan* is of course not binding on us. In the Decision, the FTT did place some reliance on *Nolan* for its finding that an assessment may be made under Regulation 6 (1)(b) where no earlier excise duty point can be "identified", but in the absence of any argument or substantive reasoning on the point by the FTT in *Nolan* the case is of no real assistance to us.

Discussion

123. We start with some further observations on Articles 7 and 9 of the 2008 Directive.

124. Article 7 (1) refers to excise duty becoming payable "at the time… of release for consumption", and the phrase "release for consumption" is defined in Article 7 (2) as meaning "any" of the events then described. In our view, the clear wording of Article 7 envisages the authorities of the Member State in question being given a choice of assessing excise goods which have been released for consumption and in respect of which there has not been a prior assessment by reference to the occurrence of any one of the four events set out in Article 7 (2). This provision does not in our view set out any chronological hierarchy between the four events. Neither in our view does the wording preclude there being more than one release for consumption of the same goods. Consequently, the provision does not appear to us to preclude an assessment being raised on the basis that one of those events has occurred notwithstanding the fact that previously another of those events has occurred, provided there has not been an earlier assessment in respect of that event.

125. Article 9 of the 2008 Directive explicitly leaves it to the Member States to lay down in domestic legislation the procedure to be followed for the levying, collection and, where appropriate, reimbursement and remittance of the duty that falls to be assessed according to the requirements of Article 7. As Mr Beal submitted, the 2008 Directive therefore gives a wide discretion to the national authorities of the Member States in this regard and, as we have heard, in the United Kingdom this is effected by a mixture of the provisions contained in the Regulations and HMRC's policy regarding the exercise of their discretion as to who is to be assessed in particular circumstances where they discover excise duty goods in respect of which duty has not been paid.

126. As we have recorded at [85] above, Mr Baldry submitted that Article 7 (2) (b) of the 2008 Directive is only intended to cover situations where excise duty goods have previously been exempt pursuant to one of the exemptions in Article 12 and thereafter cease to be exempt.

127. In support of this submission, we were referred to a note dated 27 May 2008 addressed from the Presidency of the Council of the European Union to the Working Party dealing with the proposal which ultimately led to the 2008 Directive being adopted. Attached to that note was the Presidency's compromise text on the proposal, which was said to reflect the discussions held in the Working Party. In relation to the text of what was to become Article 7 (2) (b) of the 2008 Directive the following note is recorded:

> "Presidency Note:
>
> Taking into account various comments made by delegations during Working party meetings, The Presidency proposes a range of changes to the wording of Article 7 to provide for further clarity of the text.

> It has been proposed to include a special provision in para 2 with respect to goods that are exempted from excise duty but not used in accordance with the purposes for which they were granted exemption. It is understanding of the Presidency that these goods are already released for consumption upon granting exemption from excise duty. If subsequently, they are used for other purposes than exempt purposes, their chargeability is covered by other provisions of paragraph 2."

128. Mr Baldry submitted that we could use this pre-legislative material as an aid to the interpretation of the 2008 Directive. He relies on Case C – 292/89 *Antonissen* [1991] ECR I-00745 where the question arose as to the potential role, in the interpretation of EU legislation, of a declaration in the minutes of the Council meeting at which the legislation concerned was adopted. In that case, the declaration was made by the Council and was adopted unanimously by the members of the Council. At [23] of his opinion, Advocate General Darmon stated that it was "difficult to take the view that a declaration of the Council entered in the minutes of one of its meetings has as a matter of principle no role to play in the interpretation of provisions of Community law" but that the "conditions for and limits to reference to declarations of the Council entered in the minutes of a Council meeting have to be defined."

129. Having considered the limits that should be placed on the role of such a declaration, the Advocate General concluded at [27] that:

> "…a declaration of the Council entered in its minutes can constitute a guide for the interpretation of provisions of a measure of secondary legislation the drawing up or adoption of which gave rise to that declaration, only in so far as the aim is to clarify the meaning of those provisions which are ex-hypothesi ambiguous or equivocal. In contrast, such a declaration cannot serve to fill a lacuna in the provisions."

130. At [18] of its judgment in that case, the ECJ decided that the declaration could not be used in that case in the following terms:

> "However, such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance."

131. Mr Baldry submits that a declaration of the type with which *Antonissen* was concerned is less helpful than what he seeks to rely on here, namely a note explaining a particular change that is being made to legislation. On HMRC's case Article 7 (2) (b) of the 2008 Directive is ambiguous and equivocal and therefore a statement from the Council about the provision is relevant as an explanation of the purpose of the provision in question.

132. In our view, we should not take account of the Presidency Note in interpreting the 2008 Directive. There is no degree of formality regarding the note, emanating as it does from officials within the Council rather than with the authority of the Council itself. It was simply a note accompanying a final text of legislation to be proposed to the Council and must be considered to be of less weight than a formal declaration. We have been shown no authority that would indicate that it is permissible to use such

material as an aid to interpretation of EU legislation. *Antonissen* involved a declaration of the Council itself which had been formally adopted, and even in that situation the Court did not consider that it was appropriate to refer to it because it had not been referred to in the wording of the provision in question. Clearly, in this case there is no reference to the explanatory note in the legislation.

133. In our view, the correct inference to be drawn as to why Article 7 (2) (b) was included as a stand-alone provision in the 2008 Directive is that the intention was to clarify, and codify, the position arrived at in *van de Water*. Indeed, were it admissible, the first paragraph of the Presidency Note indicates that the purpose of the new text was for clarification as well as dealing with the position of exemptions which cease to have effect. Although Mr Baldry submitted that there was no reason to make a specific provision to deal with the situation which arose in *van de Water*, we can well understand why the EU legislature would regard it as important to do so, because it illustrates and reinforces the clear policy behind the 2008 Directive that excise goods in respect of which duty has not been paid should not be freely circulating within the EU and that it is incumbent upon Member States to make an appropriate assessment where that situation is found to have occurred.

134. Moreover, were Article 7 (2) (b) intended to deal solely with the very limited exemptions in Article 12, we would expect the relevant provisions to have been included within that Article rather than in the key charging provisions of Article 7 as one of the four events which are expressed, in general terms, to amount to a release for consumption. We therefore reject Mr Baldry's submission that the provision deals only with the circumstances arising where an exemption within the scope of Article 12 of the 2008 Directive ceases to apply, and we shall consider the circumstances in which it can apply on that basis.

135. We now turn to Mr Baldry's submissions on the interpretation of the Regulations and the enabling legislation for them. In doing so, we have regard to the principle referred to at [39] above that we must interpret this legislation, so far as possible, in the light of the wording and purpose of the 2008 Directive.

136. As regards the enabling legislation, Mr Baldry submits that an assessment of a person holding the goods in the sense and manner provided by Regulation 6 (1) (b), where there had already been a release for consumption under any one of Regulation 6 (1), (c) and (d), would be ultra vires the legislative authority for the Regulations contained in the 1992 Act.

137. We accept Mr Baldry's submission that the correct interpretation of s 1 (4) of the 1992 Act is that any regulations made pursuant to that power can only impose joint and several liability in respect of the same category of excise duty point in respect of which the primary liability arises. In other words, where in relation to a particular event more than one person is involved in causing the event to happen then the liability to pay the duty which follows from the occurrence of the event can be prescribed to be joint and several on the part of all the persons concerned. However, if we were to find, notwithstanding the occurrence of an earlier event that in principle gave rise to an excise duty point, that B & M could be assessed to duty on the basis of

its holding of the goods being a release for consumption, that would not be an assessment that arose by virtue of B & M being jointly and severally liable for the duty chargeable on the goods with whoever was involved in causing the earlier event to occur. It seems to us that even if HMRC are right on their arguments, then it is only open to them to assess the duty by reference to the excise duty point which they have established, and joint and several liability can only apply to those persons involved in respect of that excise duty point. So, for example, were the assessment on B & M to be valid because at the time HMRC had not identified any earlier excise duty point, but at a later date evidence was shown to them that established such an earlier point, it would not be open to HMRC to say that B & M were jointly and severally liable with any person involved in the occurrence of the earlier excise duty point for the outstanding duty. It does not appear to us that HMRC suggest otherwise, and in fact it is implicit in Mr Beal's submissions that there can only ever be one excise duty point in respect of which duty is actually collected and not refunded.

138. We now turn to Mr Baldry's submissions as regards the interpretation of the Regulations.

139. In our view, when read in conjunction with s 1 of the 1992 Act, the language of the Regulations appears to envisage that there can be only one excise duty point in respect of the same goods. In particular, s 1(1) of the 1992 Act gives authority to make regulations for fixing *the* time when the requirement to pay any duty with which goods become chargeable is to take effect, and this time is defined as "*the* excise duty point". We do not think that the emphasis on the definite article in s 1 (1) is weakened by the reference to "an excise duty point" in s 1(2), because in context this is referring to any one of the various events which will be prescribed as constituting an excise duty point. Again, in s 1(3), which specifies the types of matter that the regulations may prescribe can give rise to an excise duty point, the wording refers to the fact that regulations "may provide for *the* excise duty point" to be any of the matters specified.

140. Whilst there is a specific reference in s 1 (3) to the time at which goods cease to be the subject of suspension arrangements being a time which may be specified as an excise duty point, there is no specific reference to the holding of goods in circumstances where duty has not been paid being such a time as may be specified. However, s 1 (3) (e) gives power to specify "such time after the time which, in accordance with regulations made by virtue of any of the preceding paragraphs, would *otherwise* be *the* excise duty point…". Aside again from the use of the definite article, we note that this indicates that any excise duty point specified pursuant to this power would be an alternative to any of the other events specified by virtue of the preceding paragraphs rather than be capable of applying as a second excise duty point. The wording of this provision therefore offers some support for the proposition that such an excise duty point may be prescribed in circumstances where it is not possible to establish any of the other excise duty points prescribed by the regulations.

141. The language of Regulation 5 thus appears to envisage a single "release for consumption" in respect of which duty may be levied: it provides for there being an excise duty point "at *the time* when excise goods are released for consumption…". This in turn suggests that Regulation 6 should be read as Mr Baldry submits, that is to

say when excise goods are released for consumption on the occurrence of the first of the four events specified in the Regulation, the excise duty point is fixed.

142. It also follows from this analysis that there could be only one "release for consumption" on the wording of the Regulations; the concept of "excise duty point" is inextricably linked to the concept of "release for consumption", because under Regulation 5 the release for consumption itself creates the excise duty point. One cannot occur without the other.

143. It is at this point, however, that we begin to part company with Mr Baldry. On his construction of the Regulations, it appears to us very difficult to envisage the circumstances in which Regulation 6 (1) (b) could apply, having rejected his submission that Article 7 (2) (b) of the 2008 Directive (and therefore Regulation 6 (1)(b) which implements the same) applies only to make goods chargeable with excise duty where a previous exemption ceases to apply. This objection would have even greater force if we were we to accept his submission that Article 7 (2) (b) of the 2008 Directive (and therefore by implication Regulation 6 (1) (b)) cannot apply where excise duty has already been "levied", which in this context on Mr Baldry's submission means "chargeable".

144. We have already rejected Mr Baldry's submission on the latter point for the reasons given at [105] above. For those reasons, in our view Regulation 6 (1)(b) has correctly implemented Article 7 (2) (b) of the 2008 Directive in making it a condition that excise duty has not been "paid, relieved, remitted or deferred" on the goods, although it may be argued that to conform to the 2008 Directive strictly the word "assessed" should have been used rather than "paid" as the correct equivalent for "levied".

145. Consequently, in our view there is a strong indication, and one that is consistent with our analysis of the authority for the Regulations in s 1 (3) of the 1992 Act, that Regulation 6 (1)(b) is intended to apply in circumstances where goods in respect of which excise duty has not been paid are being held but it has not been possible to establish an excise duty point at any earlier point in time. The provision therefore contemplates that there may have been, as a matter of principle, an earlier event constituting an excise duty point: this explains the reference in the provision to the duty not having been paid, wherever and however that may have happened.

146. We accept that this analysis may appear to sit uneasily with our view that the language of the Regulations, read in isolation, seems to indicate that there can be only one excise duty point. Furthermore, the Regulations nowhere say that an excise duty point only arises when it can be established on the facts precisely when and how it occurred. Such a construction would, however, be consistent with the terms of Regulation 13, which implements Article 33 of the 2008 Directive and which, once excise duty goods as a matter of fact have become held in the UK for commercial purposes, allows anybody who is holding the goods to be assessed for any outstanding excise duty. More significantly, this analysis is consistent with our analysis of the wording of the 2008 Directive itself, and since it is our obligation to construe the Regulations in conformity with the terms of the 2008 Directive, we should do so

without giving overriding significance to the use of the definite article in the enabling legislation.

147. In our view the wording of the 2008 Directive is significantly less prescriptive than that of the Regulations about the possibility of there being more than one "release for consumption" of the same goods in a single Member State. There is no muddying of the waters here by the use of the separate concept of the "excise duty point" or the emphasis on the definite article. As we have already said at [124] above, Article 7 (1) refers to excise duty becoming payable "at the time" of "release for consumption", and the latter phrase is defined in Article 7 (2) as meaning "any" of the events then described. Furthermore, as Mr Beal submitted is demonstrated by *BP Europa,* the phrase "release for consumption" should be regarded as a term of art rather than be construed literally, so we should not be concerned that the holding of goods can be regarded as a "release for consumption" even though a previous release may have occurred.

148. On this basis, we do not consider that assessing a person found to be holding goods in respect of which excise duty has not been "levied", in circumstances where it necessarily follows that in principle a prior release for consumption has occurred, is inconsistent with the purpose of the 2008 Directive and its predecessor.

149. As a number of the ECJ cases that we have referred to above demonstrate, it is clearly the intention of the EU legislature that Member States should take all necessary steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the EU alongside goods where duty has been paid. That would be a clear distortion of the internal market. If B & M's contentions were correct, then, as Mr Beal submitted, HMRC would be powerless to prevent that happening if they were unable to detect where, when, how and by whose agency the prior event which B&M contends will necessarily have triggered an excise duty point has occurred. That cannot be the intention behind the 2008 Directive and its predecessor. It may be for that reason that the ECJ in *van de Water* was able to say that Mr van de Water's holding of the goods in his case amounted to a release for consumption. Persons who find themselves in B & M's position can manage the risk of being assessed by taking contractual protection from their supplier, as B & M did in this particular case.

150. We accept that, if the correct interpretation of the 2008 Directive is that there can be more than one release for consumption in respect of the same goods, then which of the various persons who may have had some involvement with the goods is to be assessed for duty in respect of those goods will in many cases depend on the exercise of discretion on the part of HMRC. In relation to their policy in this regard, as Mr Beal explained it to us, HMRC appear to exercise their power to assess on the basis that only one assessment can be made in respect of the same goods. That in our view is consistent with our interpretation of the 2008 Directive and the policy behind it. As we record at [69] above, HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or

deferred, and where they do not have sufficient evidence before them to assess any other person who is liable for the excise duty by virtue of any earlier excise duty point that may have occurred.

151. As we have observed, Article 9 of the 2008 Directive gives a wide discretion to Member States as to the procedure is to be followed for the collection and, where appropriate, reimbursement or remission of duty.

152. There is nothing that we can see in the 2008 Directive or the Regulations (which appear to us to be silent in relation to these issues) that indicates that this approach is in any way inconsistent with the 2008 Directive. Indeed, we can see the merit of having a clearly established policy rather than giving individual officers complete discretion as to who should be assessed out of the numerous persons who HMRC may discover have handled the goods in the supply chain while the duty remained unpaid. The lawfulness of that policy, and the manner in which individual decisions are taken pursuant to it, would of course be subject to supervision through the medium of judicial review. Because of this element of supervision, and because it is inherent in the framework laid down by the 2008 Directive that Member States are given a wide discretion as regards collection and reimbursement, we do not consider that the discretion given to HMRC in the present context infringes the constitutional principle enunciated by Lord Wilberforce in *Vestey*. As a consequence, any lingering concerns that a member of the public in possession of a quantity of wine purchased from a retailer, but in respect of which excise duty had not been paid, might find himself assessed with the unpaid duty should in practice be allayed, provided that HMRC follow their stated policy.

153. B & M are, it appears, troubled in this case that HMRC are not following their own stated policy in certain respects: see our summary of Mr Baldry's submissions at [89] and [90] above. B & M wish to be satisfied that there are not in fact earlier points in the supply chain where an excise duty point could clearly be established on the evidence, or might be if such an investigation were in their view more vigorously pursued. We would be inclined to agree that it would not be in the interests of justice that HMRC should simply be able to sit back and say that the burden is on the taxpayer to provide the evidence to displace its liability, when the evidence that HMRC do actually have is in fact sufficient to demonstrate, objectively, that an earlier excise duty point could be established. We are in no position, however, to say whether that is the position in the present case, and any concerns of that nature would anyway have to be pursued through the medium of judicial review.

154. Finally, we have also considered whether we should make a reference to the ECJ, but are satisfied that the relevant principles of EU law are sufficiently clear that it is not necessary for us to do so.

Conclusion

155. Our analysis of the wording of the 2008 Directive, and of the policy considerations which are evident from its recitals and the observations in the authorities about the need to ensure that unpaid excise duty is collected when goods

have been released for consumption within the EU, leads us to conclude that the correct interpretation of the 2008 Directive, and consequently the Regulations, is that once any one of the four events mentioned in Article 7 of the 2008 Directive has occurred then it is incumbent on the Member State in question to ensure that the duty is paid. Therefore, in circumstances where it is unable to assess any person who caused a prior release for consumption to occur, it is open to the Member State to assess, in accordance with its own procedures, any person who is found to be holding the goods within the meaning of Article 7 (2) (b) of the 2008 Directive.

156. We agree with HMRC that, if B & M's contentions were correct, then, in particular in relation to imported excise goods, if HMRC were unable to establish how or when the goods concerned were imported, the products would have to go untaxed, even though the person holding them was unable to show duty had been paid. Such a result would be clearly contrary to the objective of the 2008 Directive to ensure that duties properly chargeable are collected.

157. As a consequence, we have concluded that the preliminary issue should be resolved in favour of HMRC. In particular, we consider that the recognition by HMRC that one or more other excise duty points must, in principle, have been triggered before B & M received the relevant goods did not preclude HMRC from assessing B & M for excise duty in respect of the goods pursuant to Regulation 6 (1) (b). This conclusion is subject to HMRC's power to reimburse B & M the amount of the assessment, in accordance with their stated policy, should it later be established through evidence that an assessment can be made in respect of an excise duty point which arose prior to B & M holding the goods.

Disposition

158. It follows from our conclusions that the FTT erred in law in answering the preliminary issues as it did in the Decision. Accordingly, pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007 we set aside the decision of the FTT and remake it according to the terms of our conclusions set out at [155] to [157] above.

159. There are further issues to be determined on the appeal, namely the question whether the assessment in this case was made within the prescribed limitation period as well as the question whether the evidence does in fact show that the excise duty payable on the goods remains unpaid. The penalty assessment is also contested. We therefore remit the matter back to the FTT in order that these further issues may be determined.

MR JUSTICE HENDERSON **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 10 October 2016