TC02566

Appeal number: TC/2011/09226

EXCISE DUTY – Movement guarantee – Excise goods under duty suspension arrangement – Goods stolen in course of a movement – whether risks inherent in the movement were covered by approved guarantee – Appeal dismissed – Excise Goods (Holding, Movement and Duty Point) Regulations 2010

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDWARDS BEERS & MINERALS LIMITED **Appellant**

- and -

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

TRIBUNAL: SIR STEPHEN OLIVER QC
SONIA GABLE

Sitting in public in London on 17 and 18 December 2012

Timothy Brown, counsel, for the Appellant
Michael Jones, counsel, instructed by the General Counsel for HMRC, for the Respondents

DECISION

1. Edwards Beers & Minerals Limited ("Edwards Beers") appeals against an assessment to excise duty, made on 26 July 2011, in the amount of £25,538. The assessment was issued for duty in respect of a consignment of alcohol that had been despatched from Edwards Beers' warehouse without a valid movement guarantee in place and which was subsequently stolen.

The charging provision

2. Council Directive 2000/118/EC (the "Excise Directive") contains the general arrangements relating to excise duty on the consumption of "*excise goods"* as defined in Article 1. Article 7(1) provides that excise duty is to become chargeable at the time of "*release for consumption*" which means (among other things) the departure of excise goods, including irregular departure, "*from a duty suspension arrangement*" (Article 7(2)(a)).

3. Regulation 39 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides that:

> *(1) Except for movements between tax warehouses which the Commissioners may specify in a notice, goods may not be moved under duty suspension arrangements unless-*
>
> *(a) the risks inherent in the movement are covered by an approved guarantee provided by the authorised warehouse keeper of despatch , the registered consignor or any other person the Commissioners may allow in accordance with paragraph (2) which secures such amount of the duty chargeable on the goods as the Commissioners may allow; and*
>
> *(b) the procedures in Part 6, Part 7, Part 8 or, as the case may be, Part 9 of these Regulations are complied with.*
>
> *(2) Subject to such conditions as they may specify in a notice the Commissioners may allow the guarantee referred to in paragraph (1)(a) to be provided by –*
>
> *(a) the transporter or carrier of the excise goods*
>
> *(b) the owner of the excise goods; or*
>
> *(c) the consignee of the excise goods.*
>
> *(3) In paragraph (1)(a) "approved" means approved by the Commissioners.*

The Facts

4. Edwards Beers had been holding excise goods in the form of beer and wine on behalf of Paddas Newsagents & Off Licence Limited ("Paddas").

5. On 26 August 2010, Paddas sent:

(i) a Goods Release Order to Edwards Beers with "order number" 1230, listing lots of alcohol and a request to - "Please release all the above stocks to FK Traders into Wybo Bond. I have been informed by FK Traders that the account name is Smart Traders. We shall be arranging transportation by Seabrooks"; and

(ii) seven Transport Instruction Notes ("TINs") with reference numbers 1230 to 1236 to Seabrook Warehousing Ltd ("Seabrook"), a transport company. Each TIN refers to the "Order" dated 26 August and directs that collection be from Edwards Beers for delivery to Wybo; the customer reference is FK Trading and the account is Smart Traders.

6. Seabrook notified Edwards Beers by email of 27 August that it had received instructions from Paddas *"requesting our collection of 7 loads from his account at your bond"*.

7. Between 31 August and 14 September 2010, Seabrook sent seven Movement Guarantee Authorisation Facsimiles ("MGAFs") to Edwards Beers authorising the latter to use its movement guarantee in respect of the seven specified loads. Each MGAF stated –

> *"Please accept this fax as authorisation to use our Movement Guarantee No: 1067M on the transit documentation (W8 or AAD), applicable to the following listed loads* ***only****"*.

Each MGAF concluded with the words –

> *"Please ensure correct and intended vehicle is loaded with allocated stock as per above issued references"*.

Four MGAFs dated 31 August 2010 were sent by Seabrook to Edwards Beers. These were Refs. 85517, 85518, 85522 and 85528; they related to TINs 1230, 1231, 1232 and 1233 respectively. An MGAF from Seabrook, Ref. 85912, dated 14 September 2010 and relating to TIN 1234, was sent to Edwards Beers. MGAFs from Seabrook, Refs. 85911 and 85915, both dated 13 September 2010 and relating respectively to TINs 1235 and 1236 were sent to Edwards Beers. The quantities of goods referred to in each MGAF were, in all cases, one full load.

8. At 0827 on 3 September 2010, Seabrook emailed Edwards Beers requesting the latter to load *"attached on…YJ53JYW//TM"*. The attachment was *"Guarantee Authorisation EDWARDS SWR REF 85528"*. *The* 85528 MGAF had 1233 as its "Customer Reference". TIN 1233 listed 10 items of beer for collection from Edwards Beers and delivery to Wybo Transports SARL. A "Picking List", provided by Edwards Beers, records that 11 items of beer and wine have been received by a

Carrier, identified as "YJ53JYW TM18". The Picking List is signed, by *"GARY M"* as "*Received in good condition"*. The Administrative Accompanying Document ("AAD"), signed by Stacey Edwards of Edwards Beers on 3 September 2010, records that the same 11 items of beer and wine are transported in YJ53JYW TM18. The transporter is named as Seabrook. The carrier recorded in the CMR is recorded as "Trident Continental".

9. None of the goods recorded on the AAD signed by Stacey Edwards on 3 September 2010 in relation to the transport in vehicle YJ53JYW TM18 came from the list in TIN 1233. One item, *400 cases of SKOL SUPER,* came from the list in TIN Order No. 1232. An MGAF with a Customer Ref: 1232 (and Seabrook Job Ref: 85522) showing 1 September as the Collection Date had been emailed to Edwards Beers on 31 August. On 2 September, Seabrook gave instructions to Edwards Beers to load on vehicle WPR7U72. At 0909 on 3 September Seabrook gave instructions to Edwards Beers to load, again referring the same Guarantee Authorisation (Ref 85522); this time the vehicle is 193MK. Yet another instruction to load was given by Seabrook with the same Guarantee Reference (85522); that email was dated 6 September 2010, but was cancelled within two hours. It is not in dispute that the 400 cases of SKOL SUPER were never removed from the Edwards Beers Warehouse as part of the load specified in TIN 1232. As noted, the SKOL SUPER was received by the driver of vehicle YJ53JYW in good condition and signed for at 1050 on 3 September.

10. The AAD covering the consignment of goods carried by vehicle YJ53JYW TM18 listed 10 other items of wine and beer that had come from TINs 1235 and 1236. That AAD (in box 10) named Seabrook as the provider of the movement guarantee.

11. There was no clear evidence as to when the TINs were received by Edwards Beers. And, if they had been received prior to the departure of the goods referred to in the relevant AAD, Stacey Edwards (who gave evidence) did not accept that the relevant TIN had been read. The MGAF relating to TIN 1233 had been amended in handwriting by Stacey Edwards "probably the day before the loading", she said. As specified by Seabrook, it had read "Mixed Beer". As amended by Stacey Edwards, it reads - "Mixed Beer and Wine". Stacey Edwards acknowledged that she had not checked the amendment with Seabrook and that the goods had not been despatched in compliance with the terms of the MGAF.

12. The beer and wine actually loaded onto vehicle/trailer YJ53JYW TM18 (which, as noted, had included the 400 cases of SKOL SUPER) had, Stacey Edwards explained, been selected because they had been the easiest to load.

13. On 6 September 2010 (the following Monday), Edwards Beers received information from Seabrook that the goods on the vehicle with registration number YJ53 JYW and trailer TM18 had been stolen from the Coventry depot of Trident Continental Transport.

14. Seabrook reported the theft to HMRC at 1322 hours the same day. The description of the goods in that report tallied exactly with the list in TIN 1233 (to which MGAF 85528 referred), i.e. all contents were beer and no reference was made to either the 400 cases of Skol Super referred to in paragraph 10 above or to any wine. At 1624 hours, Seabrook notified HMRC that they had been advised by Paddas –

> "*that Edwards did not load their o/n 1233 as previously advised but loaded as per the details listed below in the …email to Paddas from Edwards"*. The notification went on to say – "*Please be advised that the Movement Guarantee Authorisation Facsimile sent to Edwards on 31/08/10 was specific to the goods Paddas o/n 1233. Edwards have no authorisation to use [Seabrook's] movement guarantee for the goods they loaded and therefore they have completed the AAD incorrectly quoting [Seabrook's] movement guarantee without authorisation"*.

15. HMRC assessed Edwards Beers in the sum of £25,538 in respect of unpaid excise duty on the goods listed in the AAD and did so on the basis that Edwards Beers had moved goods under a duty suspension arrangement without a valid movement guarantee in place.

The Case for Edwards Beers

16. Seabrook, it was contended, knew it was guaranteeing the movement of goods because it issued MGAFs for all goods on the Goods Release Order of 26 August 2010 which included the stolen goods. Seabrook's email of 6 September 2010 (see paragraph 14 above) showed that Seabrook had been attempting to protect itself as it knew that its guarantee would be called on by HMRC for the excise duty if it admitted that Edwards Beers had had authority to use it. The knowledge attributed to Seabrook, i.e. that its movement guarantee was being used for the stolen consignment, resulted from Seabrook's contractual arrangements with the actual transporters; it was the principal and when the driver signed his acceptance of the goods (on the Picking List) and the AAD, the knowledge of the carrier (said to have been Trident Continental) will have been attributed to Seabrook.

17. The 400 cases of SKOL SUPER, were in any event, covered by the MGAF of 31 August 2010 relating to TIN 1232.

18. The decision of HMRC to assess Edwards Beers was disproportionate and, consequently, wrong. The prime liability should have been allocated to Paddas, the consignor, or Seabrook as guarantor.

Conclusions

19. The critical question is whether the stolen goods had been moved in accordance with the conditions specified in regulation 39 of the 2010 Regulations. Regulation 39(1) directs that the goods (all of which were "excise goods", being alcohol and alcoholic beverages within Article 1.1 of the Excise Directive) may not be moved under duty suspension arrangements unless –

"(a) *the risks inherent in the movement are covered by an approved guarantee"*.

There is no dispute that the Seabrook had an approved guarantee and that the form of words used by Seabrook in the relevant MGAFs satisfies HMRC's requirements. HMRC say of the stolen goods that there was no such guarantee of the risks inherent in the movement covered by the AAD. Seabrook authorised the use of its movement guarantee in respect of, but no further than, the specified loads described in the respective TINs. The load described in the AAD in question here was different from the loads described in any of the TINs.

20. The MGAF operates as a grant of authorisation to use the Seabrook movement guarantee. Edwards Beers, as grantee, is permitted to use the guarantee "*on the transit documentation…applicable specifically to the following listed load only*". The authorisation is, say HMRC, movement specific. It does not attach to the separate ingredients in the specified load. The load was the load to which Seabrook's emailed instructions of 0827 on 3 September 2010 related, namely those covered by "Guarantee Authorisation Ref: 85528" which identified the load listed in TIN 1233. That load had not been the load covered by the AAD. The movement of that load had not, in consequence say HMRC, been covered by an appropriate guarantee.

21. We think that HMRC's reading of the words of regulation 39(1) is correct. The focus of the regulation is on the "movement". Article 20 of the Excise Direction, for instance, provides for the occasions on which a movement of "the excise goods", is to be taken as having begun and ended. That expression connotes the collection of individual goods comprised in the movement. To the same effect are the words of Article 3(3) of the 2010 Regulations.

22. The wording at the end of the MGAF requires that *"the correct and intended vehicle has been loaded with the allocated stock as per above issued references"*. That expression indicates that Seabrook, as the grantor of the benefit of its movement guarantee, was making it available to Edwards Beers, as grantee, to cover the risks inherent in the movement of the whole listed load as distinct from each item of excise goods comprised in it.

23. Was Trident Continental, the actual carrier (which, we were told, operated as subcontractor to "Freightex", a business that had been directly contracted to Seabrook), the agent whose knowledge of the real content of the load to which the AAD related was, as was argued for Edwards Beers, to be imputed to Seabrook? We had no evidence of the arrangements between Seabrook and either Trident Continental or the driver. Thus applying the definition of "agency" in the opening words of the Nineteenth Edition of Bowstead and Reynolds on Agency as being -

> "*the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act of so acts pursuant to the manifestation"*

We cannot begin to be satisfied that either Trident Continental or the driver (Gary M) was agent in any sense relevant to this matter. The only grantor of the benefit of the movement guarantee was Seabrook. Nothing expressed in the MGAF nor anything that can be implied from the limited documentation that we have seen indicates that Seabrook was conferring on Trident or the driver M the authority to alter or, still less, to widen the scope of the MGAF. Thus, whatever Trident or the driver may have known about the content of the load covered by the AAD, Edwards Beers cannot contend that the risks inherent in the movement were covered by an approved guarantee.

24. In that connection, the evidence shows that Seabrook did not know that the use of its movement guarantee had been adapted by Trident Continental or the driver to cover the contents of the stolen load, nor had it authorised any such change. When, on 6 September 2010, Seabrook heard that the load had been stolen, it reported to HMRC that the stolen goods were those listed in TIN 1233. The clear inference is that Seabrook had expected that the goods on the vehicle/trailer would match the goods listed in TIN 1233 to which MGAF 85528 referred. We cannot, in this connection, infer that Seabrook had been attempting to "protect itself" by, presumably, misleading HMRC when it sent the emails of 6 September to HMRC.

25. The 40 cases of SKOL SUPER were listed in TIN 1232 to which MGAF 85522 referred. They left Edwards Beers' warehouse as part of the load conveyed by the vehicle/trailer YJ53JYW//TM18; the loading instruction from Seabrook, in the email of 0827 on 3 September 2010, was based on MGAF 85528 (which referred to TIN 1233). There was, therefore, a complete mismatch; and the risks inherent in the actual movement of those 40 cases were not covered by any approved guarantee. We cannot therefore accept the argument that Seabrook had authorised Edwards Beers to use its movement guarantee in respect of those goods.

26. For those reasons we conclude that the stolen goods had not been moved in accordance with the conditions in regulation 39.

27. Was HMRC's decision to assess Edwards Beers disproportionate such that principles of EC jurisprudence require us either to set the decision aside or require HMRC to reconsider the decision?

28. Article 8.2 of the Excise Directive provides that – "W*here several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt."* That provision does not, we observe, stand as a defence to a person against being made liable. Its effect is to enable HMRC to collect the duty from the range of persons who have been made chargeable by the operation of the relevant laws of the Member State. It is correct, as was pointed out for Edwards Beers, that "other persons involved in" an irregular departure from a tax warehouse may, under regulation 8(1)(a) of the 2010 Regulations, be liable for the duty. But, as far as we are aware, no other person has been charged with the excise duty. The liability is that of Edwards Beers alone. Even if there had been other persons who had been made liable in the circumstances of the movement of the stolen goods, there would be nothing offensive to EC principles if HMRC were to seek to recover the duty from Edwards

Beers to the exclusion of those others. The Excise Directive positively permits such a course. Thus, if HMRC were to have taken such a course, they would (to quote from paragraph 67 of the decision of the Court in *Paraskevas Louloudakis* (Case C-262/99)), have "*exercised the power to recover in accordance with Community Law and its general principles and consequently with the principle of proportionality*".

29. For those reasons we are bound to dismiss the appeal.

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

SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE

RELEASE DATE: 22 February 2013