[2015] UKFTT 336 (TC)

TC04522

Appeal number:MAN/1999/0739

EXCISE DUTY – diversion – goods leaving duty suspension arrangements – Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 – whether appellant as haulier caused goods to reach excise duty point – joint and several liability – procedure – whether stay of proceedings prevented a fair hearing or amounted to an abuse of process – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALEXANDER JAMES THOMPSON **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS GAY WEBB

Sitting in public in Manchester on 12 January 2015 with further written submissions on 23 January 2015, 20 and 22 April 2015

Dr Christopher McNall of counsel instructed by Backhouse Jones Solicitors for the Appellant

Mr Joshua Shields of counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

Background

1. This appeal was lodged with the VAT & Duties Tribunal on 13 October 1999. For much of the time since then it has been stayed pending the outcome of a dispute between Greenalls Management Plc and the Respondents. We explain the long procedural history in more detail below.

2. The substance of what remains in dispute between the parties is a notice of joint and several liability to excise duty in the sum of £112,665 ("the Notice"). The Notice was given on 12 July 1999. It relates to an alleged diversion of excise goods from duty suspension arrangements on their departure from Houston Warehousing Limited ("Houston") on 16 July 1998.

3. The issues which arise were described in the parties' skeleton arguments served prior to the hearing. They may be briefly described as follows:

(1) Whether the appeal should be allowed on the basis that passage of time means the appellant can no longer receive a fair hearing.

(2) Whether the respondents' Statement of Case should be struck out on the ground that the respondents have failed to co-operate with the Tribunal such that the Tribunal cannot now deal with the proceedings fairly and justly.

(3) If the appeal is not allowed or the respondents' Statement of Case is not struck out, whether the appeal should be allowed on its merits. In particular the appellant submits that he did not cause the goods to reach an excise duty point.

4. We set out below the procedural history of the appeal, our findings of fact based on the evidence we heard in relation to the substantive merits of the appeal and our decision in relation to the issues argued.

Procedural History

5. As mentioned, the Notice of Appeal was lodged on 13 October 1999. The grounds of appeal were essentially as follows:

(1) The appellant ("Mr Thompson") did not deliver the goods for home use. He did not know that the goods were duty unpaid.

(2) He could not have caused the goods to reach an excise duty point because he was not aware that the goods were duty unpaid.

(3) The excise duty point was the time when the goods left Houston's warehouse and were loaded on to Mr Thompson's vehicle by the warehouse staff. At that time the trailer was sealed by warehouse staff. Mr Thompson had nothing to do with their movement until after that time and he could not therefore cause them to reach an excise duty point.

(4) The warehouse ought to have realised, by asking Mr Thompson or his driver, that the goods were not destined for Belgium.

6. In 1999 Mr Thompson was also being held jointly and severally liable for other movements of excise goods from Greenalls Brewery in Warrington and Mistlay Quay in Essex. Greenalls Brewery, Mistlay Quay and Houston were all authorised tax warehouses, otherwise known as bonded warehouses.

7. On 26 October 1999 the present appeal was stood over pending tribunal decisions in other appeals, including appeals by Mistlay Quay. The stand over followed an application by the respondents to which the appellant did not object.

8. On 12 August 2002 the appeal was stood over generally following a hearing at which both parties were represented.

9. At a hearing on 5 August 2004 the appeal was stood over pending a decision of the House of Lords in Greenalls Management plc. Again, both parties were represented at the hearing. The issue in Greenalls was whether Greenalls were liable for the duty as warehousekeeper. If the warehousekeeper was not liable for excise duty following a diversion, then there could be no joint and several liability on the part of Mr Thompson.

10. The Opinions in the House of Lords were given on 12 May 2005. Their Lordships held that Greenalls was strictly liable as warehousekeeper, without any proof of fault on their part.

11. By a direction made on 5 June 2007 the respondents were directed to serve their Statement of Case and list of documents by 13 July 2007. The time limit was subsequently extended to 3 August 2007. The Statement of Case and list of documents were served by the respondents on or about 3 August 2007. The Statement of Case dealt with decisions imposing joint and several liability in relation to removals from Greenalls, Mistlay Quay and Houston. By this time the appeals of Mistlay Quay had been withdrawn. The respondents indicated that they were no longer pursuing a joint and several liability in relation to goods removed from Mistlay Quay.

12. There was then correspondence between the parties in October 2007. The appellant was seeking specific disclosure of documents. The respondents' position was that in Greenalls' appeal, there could well be a hearing in relation to issues of quantum. In the end the parties agreed that the present appeal should be stood over until 1 May 2008.

13. The parties subsequently agreed to further standovers to 2 March 2009 and 3 December 2009.

14. In February 2010 the Greenalls appeal was still continuing and Greenalls were considering making an application to join their appeal with the present appeal. The two appeals were listed together for a case management hearing together on the first available dated after 9 March 2010.

15. In the event Greenalls did not make any application to join their appeal with the present appeal. In May 2010 Mr Thompson's solicitors agreed to his appeal being stood over until the earlier of 30 days after any decision in Greenalls' appeal and 30 December 2010.

16. On 7 January 2011 the respondents applied to extend that stand over until 30 June 2011 or 30 days following the decision in Greenalls. There was no objection by the appellant and the tribunal extended the stand over. This was confirmed in a letter dated 2 February 2011 as follows:

> "*… the appeal and all matters relating thereto are stood over until the appeal of Greenalls Management Ltd is determined.*
>
> *It is the responsibility of the party applying for the standover to inform the Tribunal as soon as all matters relating to the lead case have been finalised.*"

17. It was not until 16 May 2014 that the respondents wrote to Mr Thompson's solicitors to say that there had been no formal hearing before the tribunal in the Greenalls appeal. They stated that they would not be pursuing joint and several liability in relation to the Greenalls assessment, but that they would continue to pursue the Notice in relation to the Houston movement. The respondents intimated that it was appropriate to lift the stay to take the appeal forward to a hearing.

18. There was no evidence before us as to what had happened between February 2011 and May 2014. We have reviewed the Tribunal's case management system which shows that the Greenalls appeal was withdrawn on 14 April 2011. There was therefore a delay of some 3 years before the respondents notified the Tribunal for the purposes of the present appeal that the Greenalls appeal had been finalised.

19. On 16 May 2014 the respondents applied to lift the stand over imposed following their application dated 7 January 2011. By a direction made on 8 July 2014 the tribunal gave directions for the stay to be lifted, for an amended Statement of Case, amended Grounds of Appeal and consequential directions for the hearing of the appeal.

20. The appellant served amended Grounds of Appeal on 11 September 2014. They were expressed to supplement the original grounds of appeal summarised above. In essence the appellant alleged that:

(1) Because of the lapse of time since the Notice the tribunal should either:

(a) Set aside the Notice, or

(b) Debar the respondents from defending the appeal under Rule 8 because the respondents had failed to co-operate with the tribunal to such an extent that the tribunal could not deal with the proceedings fairly and justly.

(2) The respondents had secured an unfair tactical advantage in having the proceedings stood over between 1999 and 2014.

(3) The law under which liability was said to arise is obsolete.

(4) The appellant's rights to a fair trial in a reasonable time under Article 6(1) of the European Convention of Human Rights had been breached. The delay has caused prejudice to the appellant in mounting an effective case. In particular the delay had caused evidential difficulties, including the unavailability of a witness (Stuart Reid) to give evidence.

21. Before making our findings of fact and considering the issues we shall set out the legal framework under which excise duty is charged.

Legal Framework – Excise Duty

22. At the time of the events relevant to this appeal the charge to excise duty was governed by *Council Directive 92/12/EEC* ("the Directive"), *Customs and Excise Management Act 1979* ("the Act") and the *Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992* ("the Regulations").

23. The Directive, the Act and the Regulations provided for movement of goods between approved excise warehouses with duty suspended, subject to rigorous conditions. The time at which duty becomes payable is referred to in the Regulations as the excise duty point. The following specific provisions applied:

Directive Article 6

"(1) *Excise duty shall become chargeable at the time of release for consumption* …

(2) Release for consumption of products subject to excise duty shall mean –

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

Regulation 4(2)

"*If any duty suspension arrangements apply to any excise goods, the excise duty point shall be the earlier of:*

(a) the time when the excise goods are delivered for home use from a tax warehouse or are otherwise made available for consumption …

…

(f) the time when the excise goods leave any tax warehouse unless -

(i) the goods are consigned to another tax warehouse;

(ii) the goods are delivered for export …"

Regulation 5

"*(4) The person liable to pay the duty when the excise duty point specified in paragraph 2(a) of Regulation 4 above occurs, shall be the authorised warehousekeeper.*

(5) Each of the persons specified in paragraph (6) below having the specified connection with the excise goods at the excise duty point shall be jointly and severally liable to pay the duty with the person specified in paragraph (4) above.

(6) The persons specified (for the purposes of paragraph (5) above) are –

(a) any owner of those excise goods or other person beneficially interested in those goods; and

(b) any other person who causes or has caused those goods to reach an excise duty point. "

24. Regulation 10(1)(b) required goods moving between excise warehouses under duty suspension arrangements to be accompanied by an accompanying document, that is an Administrative Accompanying Document or "AAD".

25. We deal below in our reasons for this decision with relevant authorities which have a bearing on these provisions.

Findings of Fact

26. The evidence before us on behalf of the appellant comprised oral evidence from Mr Thompson, who had made a witness statement dated 21 October 2014. On behalf of the respondents we heard oral evidence from Mr Ian Sked, a Higher Officer of HM Revenue & Customs who had made a witness statement dated 20 October 2014. We also had a bundle of documents which were adduced in evidence.

27. Mr Thompson was being asked to recall details going back some 17 years. We are satisfied that he retained a good memory of events generally, but understandably he could not recall some of the detail he was being asked to recall. We have taken this into account in our findings of fact. In the light of all the evidence we make the following findings of fact.

28. Mr Thompson has traded as a self-employed lorry driver under the name of A J Thompson & Son since about 1982. For 10 years prior to that he was employed as a lorry driver. He had a standard national Operator's Licence which entitled his firm to transport his own goods in the UK and internationally and third party goods but in the UK only.

29. Between 1993 and 1998 Mr Thompson operated two vehicles from his base in Bacup, Lancashire. He used the services of a self-employed driver, Mr Stuart Reid to

drive the other vehicle. In 1999 Stuart Reid stopped working for Mr Thompson and Mr Thompson has not spoken to him since.

30. At all material times Mr Thompson had three main customers for whom he transported fertiliser and stone flags. When he was delivering for one of his main customers he would seek "backloads" from other customers. As the name implies, backloads are contracts to transport goods on the return journey. They make the journey as a whole more profitable. If a backload could not be arranged then the vehicle would return home empty.

31. Mr Thompson generally obtained backloads from contacts he had built up in the haulage industry and through referrals.

32. In the middle or latter part of 1997 Mr Thompson said that he was introduced to an Asian gentleman called Steve. He could not recall who had introduced him to Steve, or Steve's surname. He met Steve at Smethwick Truck Stop in West Bromwich with a view to discussing business Steve might give to Mr Thompson. Between then and July 1998 Mr Thomson carried approximately 10-15 loads for Steve. The main locations for collections were Greenalls Brewery in Warrington and Mistlay Quay in Essex. On one occasion he was asked to collect goods from Houston which had a warehouse in Renfrew, Scotland. Greenalls Brewery, Mistlay Quay and Houston were all bonded warehouses for the purposes of excise duty. Mr Thompson stated in his witness statement that he "*was not particularly aware [of that] at the time*".

33. It was goods collected from Houston on 16 July 1998 in a lorry driven by Stuart Reid which led to the Notice, following an assessment to excise duty on Houston.

34. Generally when goods were picked up from the three locations mentioned, they would be loaded onto Mr Thompson's vehicle by the warehouse staff. The trailer would be sealed by the warehouse staff with a customs seal. The driver would be either Mr Thompson or Mr Reid. They would be given a brown envelope which they would then hand in at the delivery location. Mr Thompson said that he had no cause to inspect the contents of the envelope because Steve would give instructions as to delivery. On many occasions an individual would meet Mr Thompson or Mr Reid and escort them to the delivery location. Mr Thompson assumed that Greenalls, Mistlay Quay and Houston knew where the goods were being delivered.

35. Mr Thompson did not have an address for Steve. He would meet him at Hilton Park Services on the M6, present him with invoices for work done and would be paid by cheque or in cash. All invoices and payments were included in Mr Thompson's accounting records. Notwithstanding the circumstances in which Mr Thompson came to deal with Steve, his main concern was getting paid. In his words "*that was all I was bothered about*".

36. Mr Thompson was never informed that the goods being collected on the instructions of Steve were alcoholic drinks. However when he was present he could see that they were drinks such as beer and vodka.

37. Mr Thompson was contacted by Steve on or about 1 July 1998 and asked to collect goods from Houston. He was also asked by Steve to forward information to a Mr Euan Shand of AAG Trading (trading as Cellars Scotland), including his goods in transit insurance.

38. Mr Thompson was asked by Steve to collect the goods from Houston on 16 July 1998. Mr Thompson was working elsewhere on that date and he instructed Stuart Reid to collect the goods and deliver them as requested. The question of whether this was a backload was not canvassed in the evidence.

39. The goods collected from Houston were 1200 cases of whisky on 22 pallets. We are satisfied that Stuart Reid collected the goods and delivered them to a location in Airdrie. Mr Thompson was paid approximately £300 for this load, which he described as "*decent money*".

40. Mr Thompson has not spoken to Stuart Reid since 1999. He stated that in the time it has taken this appeal to come to a hearing he has lost contact with Stuart Reid and has been unable to ask him to provide a witness statement.

41. Two days after the movement, on 18 July 1998 Mr Thompson was interviewed by Mr R Gledhill, an officer of HM Customs & Excise as they then were. Mr Thompson told Mr Gledhill that he was aware Customs & Excise displayed notices at bonded warehouses and also that they used seals in connection with goods at such warehouses. He said that he did not take much notice of the contents of the notices. He said that he was not aware of the tax and duty position of goods stored in bonded warehouses. He thought the term bonded referred to an extra level of security to protect high value goods. When Mr Gledhill asked whether the alcohol being carried was duty paid or duty suspended, he answered "*I haven't a clue, I just pick it up*".

42. During the course of the interview and at Mr Gledhill's request Mr Thompson asked Stuart Reid to join the interview and he too was asked questions by Mr Gledhill.

43. Mr Thompson maintained in his evidence that in 1998 he did not know the significance of bonded warehouses or that excise goods were stored in such warehouses without payment of duty. When he was asked whether he was aware of such matters in 1998 his response was equivocal. He said "*not really*". Clearly the passage of time makes it difficult for Mr Thompson to recall. It is clear however that from the time of his interview in 1998 Mr Thompson has consistently maintained that he did not know the significance of a warehouse being bonded. We found it hard to believe that an experienced lorry driver such as Mr Thompson would not have known that excise goods were stored duty unpaid in bonded warehouses. On balance we think it likely that Mr Thompson did know that fact in 1998.

44. Documentation in evidence before us enabled us to identify some of the details leading up to the movement of whisky on 18 July 1998. From the documentation the sale transactions appeared to involve in part the following chain of deals:

Glen Catrine Bond → Cellars Scotland → UCCS (for its client)

45. The following details emerge from the documentation albeit we are satisfied none of the details were known to Mr Thompson, save where specifically identified.

(1) On 1 July 1998 Mike Semehen of UCCS (Manchester) Ltd representing a client faxed Euan Shand of Cellars Scotland to confirm that UCCS had received a deposit of £5,000 in relation to an order for 1200 cases of whisky and would forward it to Mr Shand. He informed Mr Shand that the stock would be collected by A Thompson & Son. Mr Thompson said in evidence that he was contacted by Steve on 8 July 1998. It seems more likely that it was on or about 1 July 1998 although nothing really turns on the precise date. A receiving warehouse in Belgium was identified as Hessenatic Logistics NV. Insurance details were to be forwarded to Mr Shand. The collection date was identified as 16 July 1998.

(2) On Thursday 2 July 1998 Mr Semehen sent a UCCS cheque to Mr Shand for £5,000. He stated that the whisky trailer had "arrived" the previous day and the AAD should be received by Tuesday or Wednesday, which must be the following week. The reference to goods arriving was presumably to their arrival at Glen Catrine, but how Mr Semehen would know that is not clear.

(3) On 3 July 1998 the whisky was invoiced by Glen Catrine Bonded Warehouses Ltd to Cellars Scotland. The total price charged was £15,540 plus freight costs of £850. Delivery was to be to Hessenatic Logistics in Belgium and delivery was described as "DDU", which meant Delivered Duty Unpaid. The Freight Forwarder was identified as "Barbour European". The terms of payment were cash in advance.

(4) On 9 July 1998 Mr Thompson faxed Mr Shand of Cellars Scotland providing "*proof as requested*". As mentioned above, he did this at the request of Steve. The "proof" mentioned referred to details of Mr Thompson's VAT registration. Mr Thompson stated in the fax that his goods in transit insurance would be sent direct from his broker. It followed by fax the same day.

(5) On 9 July 1998 Mr Semehen of UCCS faxed Euan Shand of Cellars Scotland. He gave Mr Thompson's details as the carrier and stated that "*the transport people have stated that their wagon will be in Scotland on 15th July and must be loaded as early as possible the morning of 16th. July in order for the trailer to catch the relevant ferry … As soon as you have confirmed the bottlers details and bottling date I will forward to you the balance outstanding*". Mr Thompson maintained and we accept that he had never spoken to UCCS and that he had never been asked to move the whisky abroad.

(6) Mr Shand of Cellars Scotland faxed Glen Catrine Bond enclosing Mr Thompson's details as haulier with insurance policy to follow. Mr Shand stated "*We have been advised by our customer in Belgium that they have an ongoing contract with A J Thompson Ltd, Hauliers, Lancashire and that they wish to use them in preference to Barbours*".

(7) On 13 July 1998 Mr Shand faxed Houston enquiring about using their services for temporary storage of whisky prior to export in preference to Glen Catrine. Houston provided a copy of their Customs & Excise warehouse

approval. In a separate fax Mr Shand asked Houston to obtain clearance for shipments to two bonded warehouses, Hessenatic and another warehouse in Spain. Houston replied with clearances from Customs & Excise on the same date.

(8) Also on 13 July 1998 Mr Shand asked Glen Catrine to ship the whisky to Houston. It was confirmed that funds would be with Glen Catrine later that day.

(9) On Tuesday 14 July 1998 Mr Shand faxed Houston to expect a consignment of 1200 cases of whisky on the Wednesday or Thursday, coming from Glen Catrine Bond to be shipped to Hessenatic. He stated that Cellars Scotland would be using "*customers own transport*" and gave Mr Thompson's details. The consignment was described as "*unload and reload with no storage required*".

(10) On 14 July 1998 Mr Shand faxed Mr Semehen of UCCS to say that the truck would be ready at Houston at midday on Thursday.

(11) On 15 July 1998 Mr Shand provided insurance documentation to Houston for the load to be consigned to Belgium. The commencement of transit was identified as 16 July 1998 from Scotland to Boom, Belgium.

(12) Also on 15 July 1998, Houston faxed Customs & Excise enclosing a fax received from Mr Shand and asking for confirmation that it was "*OK to export*". Later that day Houston provided copies of all correspondence they had received from Cellars Scotland and asking Customs & Excise to "*investigate its history*".

(13) An internal Customs & Excise memorandum dated 16 July 1998 indicates that SEED checks had been carried out on "all of the parties involved" and Houston had been advised it was their commercial decision whether to go ahead with the deal.

(14) On 16 July 1998 Houston prepared an AAD for the movement showing 1200 cases of whisky being despatched to Hessenatic in Belgium. The transporter was shown as Cellars Scotland. The consignee was a Belgian firm called Broeckx & Co.

(15) Houston also prepared a loading schedule identifying Mr Thompson as providing the transport. The schedule identifies the load as being "*under bond*" and is signed by a "David Grimes".

(16) On 29 July 1998 Mr Shand asked Hessenatic to confirm they had received the load and to fax a copy of the AAD. Hessenatic replied to say that they had never received the load. They stated that the signature of their employee on a copy AAD provided by Mr Shand was a forgery.

(17) On or about 31 July 1998 Houston received what purported to be a Copy 3 AAD from Hessenatic. We are satisfied that entries on this document purporting to evidence actual delivery to Hessenatic were false.

46. We are satisfied that the documents given to Stuart Reid by Houston in a brown envelope included the AAD prepared by Houston which was intended to travel with the goods to the Belgian warehouse. There is no reason to think that Houston would not have provided the AAD to the driver. Mr Reid plainly ought to have inspected the

documentation accompanying his load but he failed to do so. If he had done so, he would have realised that the goods were intended for removal to Belgium and not Airdrie.

47. In his evidence Mr Thompson stated that his understanding was that David Grimes, whose signature appeared on the Loading Schedule, was a friend of Stuart Reid. We have no reason to doubt that David Grimes was connected with Stuart Reid. It would not be right for us to speculate as to the circumstances in which David Grimes' name came to appear on the loading schedule. Unfortunately Mr Reid was not asked about the document at the time of his interview by the respondents or subsequently by either party.

48. It is not disputed that Stuart Reid delivered the goods to an industrial unit in Airdrie on the instructions of Steve. When Stuart Reid was interviewed by Mr Gledhill he said that he was given "the usual paperwork" which we infer was the brown envelope described by Mr Thompson. He also said that he did not look at the paperwork but handed it over on delivery. Whilst Stuart Reid did not give evidence, we have no reason not to accept the account he gave to Mr Gledhill.

49. It has never been suggested by HMRC that Mr Thompson or Stuart Reid were complicit in the diversion of the whisky. We are satisfied that Mr Thompson did not carry out international movements of goods. We are also satisfied that he did not have any customers or contacts in Belgium.

50. Stuart Reid continued to work for Mr Thompson for about a year. Mr Thompson was aware from 18 July 1998 onwards when he was interviewed by Mr Gledhill that there was a problem with the load and he ought to have realised that he would need help from Stuart Reid in resolving that problem. In particular to confirm the circumstances in which the goods were collected from Houston and delivered to premises in Airdrie. Mr Thompson understands that Stuart Reid went to Spain a year or two later. That seems to have been when Mr Thompson lost contact with Mr Reid.

51. On 12 July 1999 Houston were assessed to excise duty in relation to the movement of whisky in the sum of £112,665. They appealed the assessment but later withdrew their appeal. They have not paid the assessment.

52. The Notice was given to Mr Thompson on 12 July 1999 and on the same date a similar notice was given to UCCS. The notice to UCCS was subsequently cancelled as Customs & Excise were satisfied that at the time of removal from Houston, UCCS were no longer the owner of the goods.

53. At or about the same time, Mr Thompson was also given notices of joint and several liability in relation to movements from Greenalls and Mistlay Quay. As stated above, the respondents subsequently decided not to pursue those notices.

54. There was a suggestion that Cellars Scotland had been involved in previous transactions where excise goods had been diverted but we had no evidence to this effect and make no finding of fact.

55. If Mr Thompson is found liable for the excise duty then this could result in his bankruptcy. He had an accident at the beginning of November 2014 and his wagon was written off. At the time of the hearing he was 67 years of age and still working as an agency driver.

Reasons

56. The parties agreed that the burden of proof on the substantive merits of the appeal lies on the appellant (*section 16(6) Finance Act 1994*). It is for Mr Thompson to satisfy us that the Notice was wrongly given. We have a full appellate jurisdiction in that regard.

57. The decision to give the Notice to Mr Thompson was reviewed by Mr Sked in a letter to Mr Thompson's solicitors dated 9 September 1999. Mr Sked considered that a duty point arose at the time the goods were dispatched from the warehouse to Stuart Reid's possession and that Stuart Reid caused the goods to reach an excise duty point. Mr Thompson was liable as Stuart Reid's employer and as such had caused the goods to reach an excise duty point.

58. It was put to Mr Sked that his review letter contained factual omissions and failed to refer to certain relevant matters, for example the fact that Houston had been advised that entering into the transactions was a commercial matter for them. He also assumed without any evidence that Stuart Reid had signed the Loading Schedule with the name David Grimes. Whatever deficiencies the review letter might have contained, we are not satisfied that they are material for present purposes. We have a full appellate jurisdiction as opposed to a supervisory jurisdiction. We are concerned with whether Mr Thompson is, as a matter of law, jointly and severally liable for the excise duty on the basis of the facts as found.

59. Before dealing with the merits of the appeal we shall deal separately with the issues raised in Mr Thompson's amended Grounds of Appeal, as summarised above.

60. Dr McNall, who appeared for Mr Thompson, relied on the lapse of time between the events giving rise to the alleged liability and the hearing of this appeal. We accept that on any view it is undesirable that factual evidence in a case such as this should require testing more than 16 years after the events in question. We must however consider the nature of the factual issues and the reasons why so much time has elapsed.

61. Both parties saw the good sense in standing over the appeal whilst Greenalls litigated its arguments on liability to the House of Lords. The question of whether Greenalls was liable affected this appeal both in relation to its own facts and as a matter of principle. If Greenalls was not liable as warehousekeeper, then Mr Thompson would have no joint and several liability in relation to the Greenalls movements. Further, and as a matter of principle, Houston would not have been liable for any assessment and so Mr Thompson could have had no joint and several liability.

62. The procedural position up to 2005 is therefore readily explicable and no-one can be criticised for awaiting the decision in Greenalls.

63. A question arises as to whether the appeal against the Notice ought to have then proceeded, notwithstanding issues remained in relation to the quantum of the Greenalls assessment. We have been provided with no evidence as to the nature of the issues affecting the quantum of the Greenalls assessment. Nor has Mr Thompson pursued any application for disclosure to the Tribunal in that regard. We cannot say therefore, even with the benefit of some hindsight, whether it was reasonable to continue the stand over in the years following 2005.

64. In any event, whether it was reasonable or not, the parties agreed that the appeal should be stood over. Dr McNall suggests that this gave the respondents some unfair tactical advantage in defending the appeal. We are not satisfied from what we know of the procedural history that there was any unfair tactical advantage. We must infer that both the respondents and Mr Thompson saw some advantage in standing the appeal over, otherwise Mr Thompson would not have consented to the various stand over directions.

65. Dr McNall also complains about the length of time it took HMRC to resolve the Greenalls appeal. We know nothing about Greenalls appeal in relation to quantum, other than what is set out in this decision. We do not know why it took so long to resolve issues of quantum, what those issues were or how they were resolved. As we have said, the Greenalls appeal was withdrawn in 14 April 2011. It is surprising and regrettable that nothing happened in the period from 2011 to 2014. The respondents failed to notify the Tribunal or the appellant and in the absence of any explanation they are culpable for the delay between April 2011 and May 2014. We also consider that Mr Thompson through his representatives ought to have sought information from the respondents during that period as to the progress in the Greenalls appeal. There is no evidence that he did so. If he had done so, it would have become apparent that Greenalls had withdrawn its appeal.

66. Dr McNall submitted that the lapse of time entitles the tribunal to either set aside the Notice or to debar the respondents from defending the appeal. The only basis on which we could set aside the Notice would be on the merits or in accordance with the Tribunal Rules. The only rule relied upon by Dr McNall was Rule 8 which provides that we can debar the respondents from defending the appeal if they have failed to co-operate with the tribunal to such an extent that the tribunal cannot deal with the proceedings fairly and justly.

67. Dr McNall accepted that the respondents have not breached any direction of the Tribunal. The most that might be said is that they breached Rule 2(4) which requires the parties to help the tribunal to further the overriding objective. In particular they failed to notify the tribunal or the appellant as and when the Greenalls appeal was withdrawn.

68. Reliance was placed on *Foulser v Commissioners for HM Revenue & Customs [2013] UKUT 038 (TCC)*. Dr McNall submitted that the respondents conduct "*in having the matter stayed for 15 years and then seeking to resuscitate it*" amounted to an abuse of process.

69. We are not satisfied that *Foulser* assists the appellant. Firstly there is nothing in the conduct of the respondents which might properly be construed as an abuse of process. We have fully described the conduct of the proceedings above. There was no suggestion that the respondents had deliberately failed to inform the Tribunal or the appellant as to the status of the Greenalls appeal, or otherwise improperly sought to delay this appeal. In the period 1999 to 2011 the appellant had consented to the standover. In the period after 2011 there was no evidence as to why the appeal was not progressed.

70. Secondly, we are not satisfied that any conduct of the respondents has prejudiced a fair hearing. Dr McNall relied on the following prejudice arising from the lapse of time:

(1) The absence of Stuart Reid as a witness. However Mr Thompson had lost contact with Stuart Reid well before the decision of the House of Lords in Greenalls in 2005. He was also aware throughout the appeal that Stuart Reid may be a material witness.

(2) Difficulties in accessing the law under which liability is said to arise and which is now obsolete. We find it difficult to imagine any circumstances in which such prejudice could be said to arise. It did not cause either counsel any difficulties in making their submissions on the law.

71. We do not consider that delay in the period 2011 to 2014 has in any way prejudiced the appellant in putting his factual case. In any event we have accepted much of Mr Thompson's evidence. The only aspect where we have not done so is in relation to his knowledge in 1998 as to the significance of bonded warehouses. For reasons which appear below, in the end that finding is not determinative of the appeal.

72. In the light of the procedural history of the appeal we are not satisfied that the respondents have failed to co-operate to such an extent that, as a result, we cannot deal with the appeal fairly and justly.

73. Dr McNall's principal submission as to lapse of time was that Mr Thompson's rights to a fair hearing within a reasonable time under Article 6(1) European Convention of Human Rights had been breached.

74. We should say that we do not accept a submission by Mr Shields that in any event it was too late for the appellant to raise his Article 6 rights and that he ought to have done so, if at all, when the stay was lifted in July 2014. Whilst it would have been preferable for the appellant to have done so, it does not seem to us that there was any bar to raising them in his amended Grounds of Appeal served in September 2014.

75. We heard arguments as to the extent to which Article 6(1) applies to proceedings in the tax tribunal. We were referred in particular to *Ferrazzini v Italy [2001] STC 1314*; *Ali & Begum v Customs & Excise Commissioners [2002] V & DR 71*; *Jussilla v Finland [2009] STC 29*; *Le Bistingo Ltd v Commissioners for Revenue & Customs [2013] UKFTT 524 (TC)*; and *R (ToTel Ltd) v First-tier Tribunal [2012] QB 358*.

76. We were not addressed on the extent to which Article 47 of the Charter of Fundamental Rights of the European Union might assist the appellant. Arguably it does not suffer from the exclusion based on Ferrazzini and would apply to excise duty appeals as part of EU law.

77. We view these arguments as academic in the present case. Article 6(1) of the convention and Article 47 of the Charter are principally directed towards situations where, through circumstances outside the control of a party, that party is denied a hearing within a reasonable time. In the present appeal, the appellant was entitled at any stage in the proceedings to apply for the stand over to be lifted or to apply for directions to move the case forward. Even in the period between 2011 and 2014 the appellant could have sought information from the respondents as to the progress of the Greenalls appeal. No unfairness resulted from the respondents conduct or the standover.

Substantive Merits of the Appeal

78. The question for the House of Lords in Greenalls was whether Greenalls was liable for the duty. In circumstances similar to the present appeal, goods destined for Belgium and Spain had been diverted in the UK. The issue was summarised by Lord Hoffman at [7]:

> "*7. There is no dispute that there was an irregular departure from the suspension arrangement. Accordingly, there was a "release for consumption" within the meaning of article 6.1 of the directive. As a matter of European law, excise duty had to become chargeable at the time of the irregular departure. On the other hand, the directive says nothing about who should be liable to pay the duty. This is a matter which is left to Member States to decide for themselves: see van de Water v Staatssecretaris van Financiën Case C-325/99 [2001] ECR I-2729. To find out whether Greenalls became liable, it is therefore necessary to look at the United Kingdom legislation.*"

79. Lord Hoffman went on to consider the Regulations we have set out above:

> "*11. In the circumstances of this case, [paragraph 4(2)(f)] did not apply because the goods were delivered for export. But they were not lawfully exported. They were diverted for sale in the consumer market. The Commissioners say that in those circumstances the excise duty point was determined by [paragraph 4(2)(a)]. The goods were "made available for consumption". On the facts of this case, there can be no doubt that they were made available for consumption. The identity of the person who made them available is unknown. But the language does not require that they should have been made available by anyone in particular. It simply says that they must have been made available for consumption.*
>
> *12. Such an interpretation is also necessary to enable the regulations to give effect to the directive. Article 6(1) of the directive was plainly intended to impose excise duty at the time when the goods were unlawfully diverted. The*

diversion was an "irregular departure" from a suspension arrangement and therefore a "release for consumption" which should have triggered a charge to duty. However, if paragraph (a) does not cover what happened, there is no other paragraph of regulation 4(2) which does. An interpretation of paragraph (a) which covers the facts of this case is therefore not only in accordance with the ordinary meaning of the language but required by the duty of a domestic court to interpret legislation, so far as possible, to comply with the terms of the directive.

13. The importance of identifying the precise paragraph in regulation 4(2) which determines the excise duty point arises out of the fact that regulation 5, which specifies the person liable to pay the duty, does so in some cases by reference to the paragraph under which the excise duty point occurs. In particular, regulation 5(4) says that when the excise duty point specified in paragraph (a) of regulation 4(2) occurs, the person liable to pay the duty is the authorised warehouse keeper. It follows that if the correct interpretation of regulation 4(2) is that paragraph (a) determines the excise duty point in this case, that is an end of the matter. Greenalls are liable to pay the duty.

14. It is important to bear in mind that although regulation 5 is entirely domestic and is untouched by the duty to interpret legislation to give effect to European law, that is irrelevant in this case because there is no ambiguity or problem of any kind about the interpretation of regulation 5(4). Once one has interpreted paragraph (a) of regulation 4(2) and come to the conclusion that the facts of the present case fall within it, no interpretative bias is required to conclude that the person liable for duty is the warehouse keeper…"

80. Mr Shields submitted that this analysis, which is of course binding on us, is determinative of the appeal. The goods were under duty suspension, they were delivered for export, the warehousekeeper was liable, and the appellant is jointly and severally liable. He submitted that Mr Thompson's employee had collected the goods from the warehouse and therefore caused the diversion within regulation 5(6)(b). He submitted that there was no mental element involved in liability under that regulation. It was strict liability similar to that of the warehousekeeper endorsed by Lord Hoffman in the following terms at [17]:

"*17. … there was nothing unreasonable about making the warehouse keeper liable for the duty even though he did not himself intend to depart from the suspense arrangements. It is practical because the commissioners do not have to investigate the extent, if any, to which the warehouse keeper was to blame in parting with the goods. If someone else was responsible, the warehouse keeper is not without remedy. By virtue of the joint and several liability created by regulations 5(5) and (6), he has a right of recourse against those primarily responsible for the diversion. Of course he may in practice find it difficult to pursue them. But the commissioners are in the same position. The warehouse keeper can reduce the commercial risk by requiring a bond or guarantee. Whether he does so or is content to run the risk of having to pay the duty*

without effective recourse is a matter for him. No one is obliged to run an excise warehouse. It is a privilege which carries obligations."

81. In relation to the merits Dr McNall submitted that:

(1) The joint and several liability imposed by regulation 5(5) required a mental element. It did not give rise to strict liability. He submitted that it was implicit that for a person to be liable under regulation 5(5) required knowledge or at least means of knowledge that the goods were duty unpaid. The evidence did not establish that Mr Thompson or Stuart Reid knew or should have known that the goods being carried were duty unpaid.

(2) The review decision of Mr Sked was irrational in a *Wednesbury* sense because Mr Sked had regard to irrelevant material, failed to have regard to relevant material or was otherwise unreasonable.

82. We have already dealt with the second of those submissions. In response to the first submission, Mr Shields said that there was nothing unusual about strict liability and he relied on [17] of Lord Hoffman's opinion in Greenalls.

83. We start with the liability of a warehousekeeper. This arises under regulation 5(4). It is triggered when the excise goods leave a duty suspension arrangement. An excise duty point arises under regulation 4(2)(a) when there is a release for consumption. Release for consumption includes an irregular departure from a duty suspension arrangement. When goods are diverted there is a release for consumption. Nothing more is required.

84. In contrast the trigger for joint and several liability under regulation 5(5) is "*causing*" the excise goods to reach the excise duty point. Lord Hoffman himself referred to the warehousekeeper as having a right of recourse "*against those primarily responsible for the diversion*". The question the House of Lords did not have to consider was whether the element of causation in regulation 5(6) includes any element of intention, knowledge or constructive knowledge.

85. The question which arises is whether a haulier in those circumstances, who does not have knowledge that the goods are duty unpaid, can be said to have caused the goods to reach an excise duty point. Certainly it can be said that "but for" the involvement of Mr Thompson the goods would not have reached an excise duty point. There would have been no lorry at the warehouse on to which the goods could have been loaded. The question is whether that is sufficient, or whether something more is required, in particular some knowledge or means of knowledge on the part of the haulier.

86. We should say at once that there is nothing in regulation 5(6) that would naturally import any requirement of knowledge or means of knowledge. We also recognise that in the field of excise duty strict liability for duty can arise without any culpability.

87. Following the hearing we asked the parties to consider whether the decision of the Court of Appeal in *R v Taylor & Wood [2013] EWCA Crim 1151* gave any

relevant guidance on this point. Both counsel made further written submissions and Dr McNall relied on the judgment.

88. Mr Shields submitted that in relying on *Taylor & Wood* the appellant was departing from his Grounds of Appeal. He should not be allowed to do so after the evidence and oral submissions had closed. We do not accept that submission. As we have already noted, the original Notice of Appeal served in 1999 included a ground asserting that Mr Thompson could not have caused the goods to reach an excise duty point because he was not aware that the goods were duty unpaid. The precise terms in which that ground of appeal was set out are as follows:

> "*Mr Thompson could not have 'caused' the goods to reach an excise duty point because legally to cause something to happen would have meant that he was aware of the consequences of his actions and Mr Thompson was not so aware* …"

89. The question of causation has therefore been in issue since 1999. There is no unfairness in permitting Mr Thompson to maintain his argument as to what causation means in regulation 5(6)(b). In particular his factual case was that he did not know that the goods were duty unpaid and were being delivered for home use without payment of duty.

90. In *Taylor &* Wood the Court of Appeal was concerned with *regulation 13(3)(e) Tobacco Products Regulations 2001* which uses identical language to regulation 5(6)(b) of the Regulations. The context was confiscation proceedings under the Proceed of Crime Act 2002.

91. Taylor and Wood had each pleaded guilty to being knowingly concerned in the fraudulent evasion of duty payable on the importation of counterfeit cigarettes. They were participants in a criminal conspiracy, but were not at the head of it. Taylor operated a logistics company. Wood controlled a freight forwarding company, which did carry on some legitimate business. Wood gave instructions to a firm of hauliers, Yeardley, to move the goods. The cigarettes themselves were concealed in pallets of textiles. Taylor and Wood each knew what was hidden in the load. The Court described Yeardley as no more than an innocent agent in the importation of the cigarettes. There was nothing to suggest that Yeardley, or anyone working at Yeardley, would have agreed to transport the relevant load if it had known or suspected that it involved a cache of counterfeit cigarettes.

92. The Court considered Regulation 13(1) of the 2001 Regulations which provided that "*the person liable to pay the duty is the person holding the tobacco products at the excise duty point*". It was common ground that the excise duty point was when the cigarettes entered the UK port. The principal issue was whether Taylor and Wood were holding the goods at the excise duty point. The Court held that they were. We are not concerned in the present appeal with the meaning of "holding" in this context.

93. At [33] the Court went on to say that Taylor and Wood also fell within regulation 13(3)(e) as persons "*who caused the tobacco products to reach an excise*

duty point". They had made the arrangements for transportation of the goods and had taken steps to conceal the fraudulent importation. As such it would not have affected the decision if they no longer held the goods. At [34] the Court said:

> *" This conclusion is entirely consistent with Revenue and Customs Prosecutions Office v Mitchell [2009] EWCA Crim 214 [2009] 2 Cr App R (S) 66 where Toulson LJ, as he then was, observed that the choice of language in Regulation 13(3) was likely to have been chosen to make clear that attention is "being directed to the person who may not be physically making the delivery but is the person who is truly responsible for it being made" (paragraph 31); and that Regulation 13(3) "is directed at that person or body who had real and immediate responsibility for causing the product to reach that point, which will typically and ordinarily be the consignor" (paragraph 32).*"

94. What the Court said at [33] and [34] was not necessary for its decision and as such is not binding on us. It is persuasive, certainly to the extent of demonstrating that Taylor and Wood's actions had "*caused*" the cigarettes to reach the excise duty point. We do not however consider that the Court was saying that anything less than knowing involvement in duty evasion would not satisfy the requirement for causation.

95. At [35] the Court also said:

> "*In a case of this kind it is necessary to examine the precise and individual conduct of each person to see whether that conduct brings him within the terms of Regulation 13.*"

96. Somewhat surprisingly there does not appear to be any other authority as to the meaning of regulation 5(6)(b). Plainly a "but for" test of causation is insufficient. Were it not for a garage owner supplying fuel to Mr Thompson, the goods would not have reached the excise duty point. No-one would suggest that the garage owner caused the goods to reach the excise duty point.

97. The position of a haulier contracted to move goods from a bonded warehouse is plainly more proximate. In our view the actions of Mr Thompson on the facts we have found were a proximate cause of the goods reaching an excise duty point within regulation 5(6)(b). He contracted to collect and deliver the goods. It was within his power to find out whether the goods were duty paid or not, and if not whether they were being delivered to another tax warehouse so as to remain duty suspended. The goods had to have an AAD. We have found that the brown envelope contained the AAD. Even if it did not, the simple step of asking for confirmation as to the place of delivery or copies of relevant documentation would have demonstrated that Houston had been instructed that the goods were being consigned to an authorised tax warehouse in Belgium.

98. Mr Shields submitted that even if culpability was required, in the circumstances of the present appeal Mr Thompson was culpable. It was not part of the respondents' case that Mr Thompson or Stuart Reid knew the goods were duty unpaid. Mr Shields did however submit that Mr Thompson ought to have known how bonded warehouses

work, with goods passing under duty suspension. Mr Thompson ought to have realised that the circumstances in which he received instructions in relation to the goods and where to deliver them were indicative of duty evasion. Stuart Reid ought to have looked at the documents in the brown envelope and if he had he would have found that the AAD showed the goods were duty unpaid and were to be delivered to Belgium.

99. It is not necessary for our decision, but we accept Mr Shields submissions in this regard which follow from our findings of fact. We do not consider that any ignorance on the part of Mr Thompson as to the law surrounding excise duty movements assists his case. What fixes liability is not what he knew or should have known. Regulation 5(6)(b) does not make reference to knowledge or means of knowledge. It is the fact that he was responsible for moving excise goods from a bonded warehouse and out of a duty suspension arrangement that fixes liability.

Conclusion

100. For the reasons given above we do not consider that the passage of time during which the appeal has been stood over means that Mr Thompson cannot have a fair hearing. Nor do we consider the Respondents' conduct such that their Statement of Case should be struck out or they should be debarred from defending the appeal. We are satisfied that the Notice was lawfully given. Mr Thompson caused the excise goods to reach the excise duty point. In all the circumstances we must dismiss the appeal.

101. 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.

JONATHAN CANNAN

TRIBUNAL JUDGE
RELEASE DATE: 8 July 2015