



TC05252

Appeal number: TC/2015/01820

EXCISE DUTY; Council Directive 2008/118/EC (The Excise Duty Directive) Excise Goods (Holding, Movement and Duty Point) Regulations 2010, regulation 6; breach of Customs authorisation procedures; whether Goods entered into appellant's excise warehouse; No; whether importation of excise goods irregular; Yes; whether excise duty suspension point created; No; whether excise duty point triggered; Yes; whether appellant liable for excise duty in consequence of breach of such procedure? Yes; whether relevant assessment made to best judgment/Wednesbury unreasonable? No; whether consequent assessment valid and enforceable? Yes. Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BUTLERS SHIPS STORES LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC FCIArb

**Sitting in public at George House, 126 George Street, Edinburgh on 4 and
5 May 2016**

Tristan Thornton, Thornton Tax, instructed by the Appellant;

**Ross Anderson, advocate, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents.**

DECISION

Introduction

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1. This is an appeal against a statutory excise duty assessment dated 19 October 2014, confirmed on review, on 19 January 2015, in the sum of £1,766,766.85 which forms part of a sum of £2,277,935.34, comprising import duty of £101,999, excise duty of £1,766,766.85 and import VAT of £409,169.49. The
10 import duty and the VAT have been paid and are not in dispute in these proceedings.

2. The appellant (Butlers) operates an approved customs warehouse and an approved excise warehouse from the same premises at Blaikies Quay, Aberdeen. In or between about 2012 and 2014 Butlers despatched (to put it neutrally for the moment) a large quantity of excise goods, namely cigarettes (the Goods) to two
15 customers (who also operated excise warehouses) in Scotland. The question is whether Butlers are liable for excise duty on those transactions in terms of a post clearance Demand Note issued to it on 1 October 2014 and the ensuing statutory assessment made under s12(1A) FA1994.

3. Tristan Thornton, TT Tax, London, appeared on behalf of Butlers. He led no
20 evidence. Ross Anderson, advocate, instructed by the Office of the Advocate General, appeared on behalf of the respondents (HMRC). He led the evidence of Laura Cowie, an HMRC official with considerable experience in customs duties.

4. Bundles of documents were produced, along with skeleton arguments, in advance of the hearing, previously allocated as *complex*, which took place at George
25 House, Edinburgh on 4 and 5 May 2016. Additional documents were lodged with the consent of the tribunal. Additional written submissions were produced later in May 2016.

Issues in the appeal

5. On one view, Butler hint that excise duty liability, which arose because of a
30 technicality, was entirely avoidable by the proper compliance with and processing of the applicable regulatory framework.

6. The basis of this alleged technicality seems to be that the Goods, within Butlers' premises and subject to customs warehousing procedures, were moved to a part of the same premises where they ought to have been made subject to excise warehousing
35 procedure but without the requisite procedure for the discharge of the customs procedure being followed or the excise warehouse procedure ensuring that the goods were entered into the records for the excise warehouse. Until that stage has been reached the Goods could not be considered to be within an excise duty suspension arrangement and removable elsewhere without liability for excise duty. This was said
40 to be essentially an administrative error which could readily have been avoided, and

for which Butlers should not be liable for excise duty which ought not to have arisen at all.

7. HMRC, invite the tribunal to give this technical argument short shrift on the basis that it is simply an admission of liability.

5 8. While Butlers also raise a number of other arguments to justify what occurred and to avoid liability, the other principal argument now being advanced, is that the assessment in question was not made to best judgment and is challengeable on *Wednesbury* unreasonableness grounds; coupled with the possibility of drawback, raised by the parties in discussion, it is said that the assessment would not have been
10 made had a proper exercise of HMRC's discretion been exercised in the first place.

Jurisdiction

9. Jurisdiction arises by virtue of section 16(5) FA 1994. The tribunal's powers include quashing, varying or substituting another. I am not concerned with a decision as to an ancillary matter under section 16 (4) FA 1994 which gives the tribunal more
15 limited powers.

10. As already noted, a question has arisen as to whether I have power to determine whether the assessment in question, if technically sound, nevertheless falls to be set aside on the basis that it has not been made to best judgment or is otherwise unreasonable on *Wednesbury* principles. I consider this question further below. This,
20 in turn raises, the question of HMRC's statutory responsibility for the collection of revenue under the Commissioners for Revenue and Customs Act 2005, section 5, and whether that discretion is essentially managerial and such that it does not extend to enable HMRC to concede an allowance in relation to assessing an excise duty point, which they consider has properly arisen.

25 Statutory and regulatory background

11. I set out below the main features of the EU and UK legislative framework. For convenience, and further study, extracts from the principal texts are appended to this decision.

12. Excise duties are not entirely a matter of domestic law. Some are governed by
30 European Union law. However, the EU legislation is generally imposed by instruments laying down the arrangements for products subject to excise duties which are levied directly or indirectly on their consumption. For the purposes of implementation, in the United Kingdom, of the EC arrangements for excise duty, the United Kingdom legislation imposes special rules and gives power to HMRC, by
35 regulations, *inter alia* to fix the time when the requirement to pay any duty, with which goods become chargeable, is to take effect. HMRC have been given enforcement powers for purposes connected with the registration of premises for the safe storage of products, regulating their storage, treatment and removal from such registered premises, and for the inspection of goods, documents and premises. Thus,
40 in principle, excise goods may only be held under a duty suspension arrangement in a tax warehouse and only be moved under such arrangements where the applicable

conditions have been complied with. All this must be done under the specified system of electronic administrative documents.

13. Excise Notice 197 (receipt into and removal from an excise warehouse of excise goods) explains the UK's requirements for the holding and movement of excise duty. It describes the electronic monitoring control system (EMCS). It does not add anything to the customs and excise obligations established by HMRC under the auspices of the European and UK legislation. It is not therefore necessary to consider the Notice in any further detail.

Some basic principles

14. Article 3 of Council Directive 92/12/EEC of 25 February 1992¹ on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (which has, in effect, been replaced by the Excise Duty Directive)² provided that the Directive applied to *inter alia* manufactured tobacco. Article 5(1) provided that such products should be subject to excise duty at the time of their production within the territory of the Community or of their importation into that territory.

15. Article 6 provided that excise duty should become chargeable at the time of release for consumption. Release for consumption of products subject to excise duty meant *inter alia* any departure, including irregular departure, from a suspension arrangement, and any importation of those products including irregular importation where those products have not been placed under a suspense arrangement. Article 14 provided that the holding of products subject to excise duty, where the latter has not been paid, should take place in a tax warehouse

16. These and other points are made in the opinion of Advocate General Colomer in *Van de Water v Staatsecretaris v Financien*³ at paragraphs 1-14. As I understand it, the main point in citing this case was for the proposition stated in paragraphs 25 and 30 that excise duty is an indirect tax on consumption which may have a dual purpose, first to provide revenue and second and (apparently) less importantly to discourage the consumption of certain products. However, it is worth noting that, in paragraph 43, it is recorded that the Directive defined the authorised warehousekeeper as a person authorised, among other things, to hold, receive and dispatch products subject to excise duty, excise duty being suspended.⁴ The Directive defined a tax warehouse as a place where goods, subject to excise duty, are held under duty suspension arrangements by an authorised warehousekeeper and thus makes it the only premises on which the holding of products subject to excise duty, where the latter has not been paid, may take place. At paragraph 44 of the opinion, it is noted that where the excise duty has not yet been paid, holding outside a tax warehouse implies that the product

¹ Repealed with effect from 1 April 2010 by the Excise Duty Directive 2008 2008/118/EC, article 47.1.

² Council Directive 2008/118/EC (the Excise Duty Directive).

³ C-25/99 9 November 2000.

⁴ Article 4(a) of Council Directive 92/12/EC.

previously departed from a suspension arrangement or never entered one, that is to say one of the situations mentioned in article 6 (1) of the Directive applied. Thus, the conclusion of the Advocate General in that case was that article 6(1) of the Council Directive 92/12/EEC did not prevent the mere holding of products subject to excise duty within the meaning of article 3(1) from being regarded as a release for consumption where the products are held outside a suspension arrangement and the excise duty has not already been levied pursuant to the applicable provisions of Community law and national legislation.

17. These principles remain applicable and are reflected in the Excise Duty Directive, related UK legislation and the terms and conditions on which customs warehouses and excise warehouses are authorised to operate.

18. Article 101 of Council Regulation 2913/92/ECC,⁵ known as the Community Customs Code (CCC), provides that the warehousekeeper is to be responsible for ensuring that while goods are in the customs warehouse they are not removed from customs supervision; for fulfilling the obligations that arise from the storage of goods covered by customs warehousing procedure; and complying with the particular conditions specified in the authorisation. General conditions for the transfer of goods are set out in articles 511 and 513 of Commission Regulation 2454/93/EEC.⁶

19. Article 100 of the CCC enables HMRC to lay down the conditions for authorising the operation of customs warehouses. CEMA1979 ss92-3 also gives HMRC similar powers.

20. Articles 98 to 101 of the CCC make provision for the storage of non-Community goods and Community goods in a customs warehouse. The warehousekeeper is the person authorised to operate the customs warehouse. Such operation is subject to the issue of an authorisation by the customs authorities which lays down the conditions for operating the customs warehouse; the warehousekeeper is responsible for fulfilling the obligations that arise from storage of goods covered by the customs warehousing procedure and for complying with the particular conditions specified in the authorisation.

21. Article 511 of the Implementing Regulation records that the authorisation is to specify the conditions under which the movement of goods placed under suspensive arrangements between different places may take place without discharge of the arrangements.

22. Article 105 of the CCC and article 528 of the Implementing Regulation require goods received to be secured and marked etc and proper stock records to be kept.

23. Under article 203 of the CCC, a customs debt on importation is incurred through the unlawful removal from customs supervision of goods liable to import

⁵ The Community Customs Code (CCC).

⁶ The Implementing Regulation.

duties. The debt is incurred at the moment when the goods are removed from customs supervision.

24. The Preamble to the Excise Duty Directive notes, at paragraph 7, that, since
5 suspensive procedure under the CCC provides for adequate monitoring whilst excise
goods are subject to the CCC, there is no need for the separate application of an
excise monitoring system for the time that the excise goods are subject to community
Customs suspensive procedure or arrangement. The Preamble also notes, at
10 paragraph 9 that excise duty is a tax on the consumption of certain goods and that
duty should not be charged in respect of excise goods which under certain
circumstances have been destroyed or irretrievably lost.

25. Article 11 of the Preamble provides that in the event of an irregularity, excise
duty should be due in the Member State on whose territory the irregularity has been
committed which has led to the release for consumption.

26. As already noted, Excise Duty Directive sets forth a number of principles. Thus,
15 by article 2, excise goods are subject to excise duty at the time of their importation
into the territory of the Community.

27. Article 4 of the Excise Duty Directive provides a number of definitions
including:-

20 "*authorised warehousekeeper*" is a person authorised by the competent authorities *inter alia* to hold,
receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse.

"*Customs suspensive procedure or arrangement*" means any one of the special procedures provided for
under the CCC relating to customs supervision to which non-Community goods are subjected upon the
entry into the Community customs territory.

25 "*duty suspension arrangement*" means a tax arrangement applied to *inter alia* the holding or movement of
excise goods not covered by a customs suspensive procedure or arrangement, excise duty being
suspended.⁷

"*importation of excise goods*" means the entry into the territory of excise goods unless the goods
upon their entry are placed under a customs suspensive procedure or arrangement as well as
their release from a customs suspensive arrangement.

30 "*tax warehouse*"⁸ means a place where excise goods *inter alia* are held received or dispatched
under a duty suspension arrangement by an authorised warehousekeeper subject to certain
conditions laid down by the competent authorities.

28. The movement of excise goods under excise starts when the goods leave a tax
warehouse or are released for free circulation in accordance with article 79 CCC.⁹

⁷ The Excise Duty Directive, article 4(10), Holding 2010 Regulations, reg. 3.

⁸ Regulation 4.11 of the Excise Duty Directive.

⁹ The Excise Duty Directive, article 4 (7), Art 17. The Excise Duty (Holding, Movement and Duty Point) Regulations 2010 (Holding, 2010 Regulations), regulation 3(3); Article 79 CCC; see also article 20(1) of the Excise Duty Directive.

29. *Importation* under the Holding 2010 Regulations¹⁰ means the entry into the United Kingdom of excise goods unless the goods upon their entry originally placed under Customs suspensive procedure or arrangement; or the release in the UK of excise goods from a customs suspensive arrangement.
- 5 30. Tax warehouse is defined in the Excise Duty Directive¹¹ and the Holding, 2010 Regulations¹². An excise warehouse is otherwise known as a tax warehouse.¹³
31. By article 7 of the Excise Duty Directive, excise duty becomes chargeable at the time of release for consumption, which includes departure, whether regular or irregular, from a suspension arrangement.
- 10 32. “*release for consumption*”¹⁴ is defined as meaning *inter alia*:-
- the departure of excise goods, including irregular departure, from a duty suspension arrangement.
- the importation of excise goods, including irregular importation unless the excise goods are placed, immediately upon importation under a duty suspension arrangement.
- 15 33. Reflecting this provision, Holding 2010, Regulations, regulation 6 provides that excise goods are released for consumption in the United Kingdom at the time when they are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement. Importation means the release in the United Kingdom of excise goods from the customs suspense of procedure
20 arrangement.¹⁵ An excise duty point is triggered at the time when the excise goods are released for consumption in the United Kingdom.
34. Liability for chargeable excise duty is set out in article 8 of the Excise Duty Directive.
35. Generally, article 16 of the Excise Duty Directive provides that the operation of
25 a tax warehouse is subject to authorisation by the competent authorities who may require an authorised warehousekeeper to comply with specified conditions for the purposes of preventing any possible evasion or abuse. An authorised warehousekeeper is required to enter into his tax warehouse and enter in his accounts, at the end of their movement, the excise goods moving under a duty suspension
30 arrangement. By article 17, excise goods may be moved under a duty suspension arrangement from a tax warehouse to another tax warehouse.

¹⁰ Regulation 6(2).

¹¹ article 4(10).

¹² reg 3.

¹³ Holding 2010 Regulations, regulation 3; Excise Duty Directive, article 4(11).

¹⁴ Articles 7 of the Excise Duty Directive.

¹⁵ Holding 2010 Regulations, regulation 6(2).

36. Article 21 sets out the procedure to be followed on a movement of excise goods under suspension of excise duty - essentially, under cover of the computerised system of electronic administrative documents submitted to and processed by the competent authorities.

5 37. The Customs & Excise Management Act 1979 (s92), enables HMRC to approve excise warehouses and to vary or revoke their approval, all subject to such conditions as they think fit.

38. Section 12(1A) of the FA 1994 Act provides as follows:-

"(1A) Subject to subsection (4) below, where it appears to the Commissioners –

10 (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners.

The Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative"

15 39. Regulation 11 of the Excise Warehousing (et cetera) Regulations 1988 (EWER) makes provision for the receipt of goods into excise warehouses. Regulation 12 makes provision about securing, marking and taking stock of warehoused goods. Regulation 21 makes provision about record-keeping.

20 40. The Holding 2010 Regulations, provide by regulation 5, that there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom. That, in turn, is defined by regulation 6, by *inter alia* when the goods leave a duty suspension arrangement,¹⁶ when the goods are held outside a duty suspension arrangement and UK excise duty has not been paid; the goods are charged with duty at importation unless they are placed, immediately upon importation under a duty suspension arrangement, and the release in the United Kingdom of excise goods from
25 the customs suspensive procedure or arrangement.

41. Regulation 6 of the Holding 2010 Regulations was much discussed. It provides as follows:-

6

30 (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

¹⁶ Regulation 6(1)(a).

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

(2) In paragraph (1)(d) “importation” means—

5 (a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or

(b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

10 (3) In paragraph (2)(a) “EU excise goods” means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.”

Authorised procedures

42. By letter to Butlers dated 3 July 2007, Butlers was authorised to operate a customs warehouse backdated with effect from 17 October 1996. The letter set out a wide range of administrative and regulatory obligations on Butlers which, in
15 summary, related to the nature of the excise goods Butlers were authorised to store, maintenance and accuracy of stock records, the monitoring, holding, location and movement of goods.

43. In particular, the letter contained the following statements:-

20 The use of this authorisation is subject to conditions laid down in Council Regulation EC 2913/92 establishing the Community Customs Code and Commission Regulation EC 2454/93, which laid down the provisions for its implementation (page 2 top)

5 Entry of Goods To The Customs Warehouse Procedure

(a) you must ensure that all goods entered to your customs warehouse under the customs warehouse procedure are declared using normal procedures: or, is specifically authorised

6 Transfer Receipts

....

d) On physical receipt out of the premises/storage facilities the goods must be entered into the stock records in accordance with article 107 of Council Regulation (EC) 2913/92 and 266 (C) of Commission Regulation (EC) 2454/93.¹⁷

7a) Stock Records and Accounts

.....

iii) You must record information enabling the goods to be monitored, including their location and particulars of any transfers, including the commercial or technical description necessary to identify the goods;

¹⁷ The Implementing Regulation.

iv) Where goods arrive in containers you must note the type of seal, make, seal numbers and whether or not the seal is intact;

14 Discharge from the Customs Warehouse Procedure

5 a) You must ensure that all goods from (their) customs warehouse are discharged to a customs approved treatment or use

15 Duty Free Ships Stores

.....

10 You must certify and date on the commercial documentation that the particulars of the goods are correct and agree with the stock account. You must record the removal in your stock records and keep one copy of the commercial documentation in your records prior to physical release. You must notify the supervising officer 48 hours prior to removal by sending a copy of the commercial documentation. If you're supervising office wishes to examine the goods they will notify you, if not the removal can take place without further reference.....

15 You are not authorised to remove or allow the removal of goods from your warehouse for supply as Duty Free Ships stores to HM Ships.

17 Transfers

a).....

You are liable for any customs debt on failure to obtain evidence of re-export or discharge of the procedure.

20 b) You are authorised to transfer goods to another Customs Warehouse Authorisation Holder in accordance with Commission Regulation (EEC) 25454/93 Article 511,¹⁸ using the 3 copy SAD procedure.

Additional Information

25 a) Continuation of this authorisation is dependent on observance of the authorisation obligations and requirements and is subject to the general powers of revocation or variation held by the Commissioners of HM Revenue and Customs.

44. Paragraph 14(B) authorises Butlers to use the Normal Procedure Customs Input Entry (CIE) (manual C88) to declare goods (excluding for E-exportation).

30 45. The letter proceeds to require Butlers to receive a copy of the removal C88 or the C130 Out of Charge Note certified by the EP before physical release of the goods.

35 46. The letter was signed by Douglas Butler on 9 July 2007. He thereby acknowledged, on behalf of Butlers, the obligation to comply with the conditions of the approval. Butlers have disputed the soundness of the contents of this letter but have not specified or explained how the procedures identified are either unlawful or, somehow, not binding on Butlers, even although Butlers, by signing it, acknowledged that they were bound by it.

¹⁸ The Implementing Regulation.

47. In a further letter dated 7 July 2007 to Mr Butler, HMRC stated *inter alia*

5 "The above Directive states when the importation of the products subject to excise duties placed under a Community customs procedure (Council directive 92/12 EEC articles 5.1 and 5.2; Commission Regulation 2286/2003) on entry into the territory of the Community, importation shall be deemed to take place when it leaves the Community customs procedure.

The impact of this directive in conjunction with Council Regulation 2913/92/EEC and Commission Regulation 2454/93/EEC¹⁹ means goods cannot be held under two regimes at the same time."

Facts

10 *General background*

48. Butlers were granted warehouse approval in 2005 but with effect from 1 October 1999. This enabled it to warehouse goods such as wine, spirits and tobacco without payment of excise duty. They were granted customs warehouse authorisation in 2007 with effect from 1996.

15 *Compliance History*

49. In the course of correspondence over the years between 2007 and 2014, HMRC drew the following matters to the attention of Butlers.

50. Following a verification visit in the summer of 2006, HMRC, in a letter to Butlers dated 5 January 2007, noted the occurrence of a number of significant irregularities. In particular, it was noted that goods imported to customs warehouse procedure should not have been entered into the excise procedures until they had been correctly removed from the customs warehouse procedure, on the basis that goods could not be simultaneously receipted into both customs and excise warehouse procedures under reference to article 5(1) of Council Directive 92/12/EEC, then in force. It was also noted that the procedures applicable to the excise storage and distribution operations had been confused with customs warehouse procedure. The correct procedure was identified (using C88 procedure). Butlers was informed that failure to comply would yield a custom debt.

51. A similar situation arose in 2008 and 2009. A civil penalty warning letter was issued to Butlers.

52. On 26 November 2009, following recent verification visits, HMRC wrote to Butlers in *inter alia* the following terms:-

35 "During these visits it was identified that goods namely duty-free shops stores had been delivered to vessels with no receipt of signature having been obtained. Our Civil Penalty Warning Letter..... has been issued to the company to address this issue.

The company must adhere to the conditions laid down in the Customs Warehouse Authorisation C/4319613/UK (type C). You must ensure that goods imported to the Customs Warehouse procedure are

¹⁹ The Implementing Regulation.

not entered to the Excise procedure until they have been correctly removed from the Customs Warehouse procedure (goods cannot be simultaneously receipted into both Customs and Excise warehouse procedures). Article 5(1) of Council Directive 92/12/EEC refers.”

Particular Facts leading to Post Clearance Demand Note and statutory assessment

5 53. Officer Cowie has significant experience in customs duties. She is not
experienced in excise duties. In May 2014 she was required to undertake assurance
checks at Butlers' premises in relation to whether the operation of the customs
warehouse there was in accordance with customs warehousing procedure, the terms
and conditions of its authorisation and the relevant legislation. She knew that Butlers
10 was a private customs warehouse and were also authorised to operate an excise
warehouse at the same address (Blaikies Quay, Aberdeen).

54. On 17 June 2014, HMRC carried out such assurance checks at Butlers' warehouse (Blaikies Quay, Aberdeen). When in attendance at Butlers' premises on 17 June 2014, officer Cowie noted *inter alia* that Butlers did not have excise goods and customs goods marked separately in his warehouse; incorrect procedure codes have been used for dispatching goods to qualifying vessels. No reference of goods being transferred to Butlers excise warehouse prior to transfer to the warehouses of Zetland Bonded Stores and United Supplies.

55. They noted that Butlers did not have excise goods and customs goods marked separately within the warehouse. They also noted that when staff picked goods for orders, they did so from goods which were held in the same area with no markings to distinguish excise goods from customs goods. Butlers' director, Mr Hanton, was asked if the reference to "Zetland Bonded Stores" in Butlers' records was a reference to a vessel. Mr Hanton indicated that it was a bonded warehouse, but he was unsure whether it was a customs warehouse or an excise warehouse.

56. Following the visit in August 2014 HMRC, in relation to export declarations between January 2011 and June 2014, informed Butlers that the incorrect customs procedure code had been operated by Butlers. They had transferred the Goods (almost 8 million cigarettes) from its customs warehouse to the excise warehouses to two of its customers in breach of the conditions of its authorisation to operate a customs warehouse. This led to the issue by HMRC of a Post-Clearance Demand Note on or about 1 October 2014 together with a reasoned decision letter. It was subsequently upheld on review on or about 19 January 2015.

57. The decision letter dated 1 October 2014 referred to meetings which had taken place with HMRC on 12 June 2014, 17 June 2014 and 13 August 2014. The letter pointed out that the customs debt has arisen as a result of goods previously imported under the Customs Warehousing procedure being removed from Butler's' customs warehouse and transferred to premises which were not approved to hold goods under customs duty suspension.

58. No goods were seized or condemned. However, HMRC also found that proper stock records had not been kept.

59. HMRC found that Butlers had held non-community goods ie the Goods under a customs suspensive procedure in its customs warehouse in breach of its customs authorisation. Butlers had despatched such goods to the warehouses of two UK customers. Neither customer (G & Anderson) Lerwick Ltd t/a Zetland Bond, nor
5 United Supplies Ltd had authority or approval as a customs warehouse. They were excise warehousekeepers. Their premises were excise warehouses.

60. Officer Cowie pursued some email enquiries with Zetland Bond to establish whether the Goods were all to be exported. Neither Butlers nor Zetland was able to establish that the Goods had indeed been re-exported.

10 61. Finally, as already noted, Butlers do not challenge the related assessments for customs duty and import VAT. This appears to be on the basis that there was an irregular importation. The Goods were released for circulation. Failing to do so in accordance with authorised procedures, led to the consequent liability for and failure to pay customs duty and VAT.

15 **Grounds of appeal**

62. This document contains a lengthy exposition of Butlers' assertion of the facts and the law. In summary, it makes the following points:-

1) In 2014 Butlers purchased a quantity of tobacco goods that had originated from outside the EU but which were then imported into the UK from the Netherlands under arrangements for the suspension of both customs and excise duties;
20

2) the Goods were stored in Butlers' warehouse again under a duty suspension for both customs and excise duty purpose;

3) the Goods were subsequently exported from the EU by the purchasers in particular to ships offshore;

25 4) the Goods remained under excise duty suspension at all material times;

5) the Goods were moved under the appropriate procedures for excise duty suspension (the Excise Movement and Control System "EMCS");

6) once the Goods left Butlers customs warehouse and entered the purchasers excise-only warehouses, they were no longer covered by the Customs suspensive procedure or arrangement.

30 63. I have not mentioned other grounds which have now all fallen away.

64. Finally, at the outset of the hearing, after hearing parties, I allowed the grounds of appeal to be amended by adding the following paragraphs:-

21a For the avoidance of doubt, the appellant submits that the decisions made by the initial decision making officer and the review officer were wrong in law, unreasonable and/or not to best judgment. They each failed to consider that the goods in question would not be consumed in the UK or even the EU and as such that the UK properly ought not to collect excise duties on these goods. Any duty which may have been due could and should be remitted back by way of drawback claims in any event.
35

24a For the avoidance of doubt, the appellant's position is that upon the release of the goods in question from customs' suspensive procedures the fact that the goods travelled under cover of valid excise duty arrangements means that the goods were immediately placed into excise duty suspended movement arrangements. Therefore, no duty point was raised under regulation 6(1)(d).

5

65. Written directions were subsequently issued confirming the position. It seemed to me, at that stage, given my relatively limited knowledge and understanding of the issues, that it would be fair and just to allow the proposed amendment to the Grounds of Appeal as it seemed capable of being ventilated within the two days allocated to this complex category appeal. I do, however, now acknowledge (as will be seen below) that, I should have acceded to HMRC's arguments and refused to allow paragraph 21a of the proposed amendment.

10

66. The focus of the appeal now is that the Goods were placed in excise duty suspension movement arrangements and therefore no duty point was raised under regulation 6(1)(d) of the Holding 2010 Regulations, notwithstanding that Butlers accept that the Goods cannot both be in customs and excise suspension, and that it apparently asserts, in effect, that prior to the release of the Goods from the customs suspensive procedures the Goods were deemed to be in excise suspense.

15

Submissions

20

Appellant

67. Butlers submits that the question to be answered is whether there were valid exercise suspension arrangements in place when the customs procedure (admitted to be irregular) came to an end; this will determine whether there was an excise duty point. Butlers accepts that the Goods could not have been stored in both customs and excise duty suspense because there cannot be concurrent duty suspension arrangements for both taxes. It also accepts that upon entry into the United Kingdom, the Goods were placed into a customs suspensive procedure. Butlers have also accepted that the customs debt was correctly incurred when the requirements of article 203 of the CCC were met. By reason of that provision, article 98(2) of the CCC and *D Wandel v Hauptzollamt Bremen*,²⁰ the Goods were subject to import duties recoverable by way of a customs debt at the point when they were physically removed from the warehouse.

25

30

68. Butlers says that, (i) there is no requirement for goods to be warehoused before an authorised warehousekeeper can move the goods under excise duty suspension arrangements, (ii), for each movement of the Goods, an entry was raised with properly constituted movement documents under EMCS, (iii) the Goods were properly received and receipted at the excise warehouses, (iv) the Goods were never subject to excise duty suspension arrangements and accordingly EWER did not apply, (v) the Goods were not released for consumption under regulation 6(1)(d) of Holding 2010 Regulations, (vi) although article 101(a) of the CCC was breached that does not

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²⁰ [2001] All ER (D) paragraphs 45-50, especially paragraph 47.

matter, (vii) there is nothing in the Excise Duties Directive indicating that irregular importation cannot be put into excise duty suspense, (viii) it is not sufficient to say that there has been an irregular importation and therefore liability on the part of Butlers under regulation 12(2) of the Holding 2010 Regulations, (ix) the creation of a movement through the EMCS is a permissible and effective mechanism to place goods into excise duty suspense where the movements are fully recorded, trackable and monitored under the ECMS; by parity of reasoning with registered consignors under regulation 30 Holding 2010 Regulations; reference was also made to regulation 57(1) and (2) of Holding 2010 Regulations (electronic administrative documents), and (x) Butlers complied with Notice 197 paragraph 7.2.3.

69. In summary, Butlers contended that properly constituted movement alone can amount to excise duty suspension arrangements.

70. Butlers also placed reliance on article 21 of the Excise Duty Directive, regulations 35, 36, 37, 57(1) & (2) of the Holding 2010 Regulations.

71. Butlers argues, separately, that HMRC's assessment of excise duty was not made to best judgment and constituted an unreasonable exercise of discretion or no exercise of discretion at all. This seems to be based, at least in part, on what may have been (wrongly) thought to have been an agreed fact that the Goods in question were either exported or sold as ships stores for consumption outside the EU.

72. In support of this argument, Butlers points out (although this is disputed) that HMRC have accepted that the Goods were not consumed in the UK but instead exported for consumption outside the EU. Butlers refers to *Van Boeckel v C&CE*,²¹ the Advocate General's Opinion in *Van de Water v Staatssecretaris v Financien*,²² *Easter Hatton Environmental (Waste Away) Ltd*²³ and to article 11 of the Excise Duty Directive. In those circumstances it would be unjust to enrich HMRC. The Excise Duty Directive, article 11, makes provision for reimbursement or omission of excise duty in appropriate situations; the question of drawback has already been raised by HMRC. In the ordinary way, the excise duty would have been passed down to the consumer.

73. Butlers has also relied on the Register Consignor scheme to show that duty suspended movements can exist in isolation. Reference was made to regulation 36 Holding Regulations 2010, article 17(2) of the Excise Duty Directive, and article 79 CCC.

74. There is no basis, say Butlers, for HMRC's assertion that any claim that the Goods must be held in excise duty suspense before an authorised warehousekeeper can dispatch them in duty suspense.

²¹ [1981] STC 200

²² 9/11 94 at paragraph 25.

²³ 6/11/2007.

75. The position of Goods under customs duty ought not to have any impact on their status as excise goods where they are being processed by an authorised warehousekeeper within a tax warehouse.

5 76. Excise duty suspended movements can and do exist outside of the tax warehouse, both for the authorised warehousekeeper and for other types of approval. This must be possible in principle given that some approval types are only capable of moving under duty suspension arrangements and not producing, processing or holding. The tribunal should conclude that the Goods were immediately placed in excise duty suspense following each irregular importation. HMRC have failed to meet
10 their burden of establishing that an excise duty point arose and that the goods were released for consumption.

77. Mr Thornton referred various further statutory provisions some of which I refer to below and to *Eurogate Distribution GmbH v Hauptzollamt Hamburg Stadt*,²⁴ *Wandel GmbH v Hauptzollamt Bremen*,²⁵ *HMRC v Sunico A/S*,²⁶ and to *Tower McCashback v HMRC*.²⁷
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78. He relied on the registered consignor's regime and submitted that a movement can be started by intention.

79. Mr Thornton accepted that Butlers breached the customs rules and it was unlawful to remove the goods from customs suspense. However, that does not, he
20 submits, negate the ability to create excise duty suspension arrangements. The customs suspense of arrangements did not come to an end until the goods left the warehouse. When the goods were in the warehouse they were subject to Customs suspensive arrangements. They couldn't then be subject to excise duty so could not be warehoused for excise purposes.

25 80. Mr Thornton also challenged the general lawfulness of the decision to assess on the basis that a duty point had occurred. He appeared to argue that the decision had not been raised to the best of the decision maker's judgment and that the discretion to assess had either been exercised unreasonably or there had been no exercise of any such discretion at all. He referred to *Van Boeckel v C&CE*.²⁸, *Atom Supplies Ltd*
30 *HMRC*,²⁹ *FFG Hildebrand v HMRC*,³⁰ *Easter Hatton (Waste Away Ltd)*,³¹ *TDG Ltd v*

²⁴ C-28/11 6/9/2012 paras 8 and 35.

²⁵ [2001] All E R (D) 04 Feb.

²⁶ [2013] EWHC 941 (Ch). paragraphs 91-103.

²⁷ [2012] 2 AC457.

²⁸ [1981] ST 290.

²⁹ [2015] UKFTT 388 (TC).

³⁰ C00242 LON/07/7002.

³¹ Landfill tax Cases (archive) L00026, Edinburgh, 29/11/07.

C&CE,³² *Best Buy Supplies Ltd v HMRC*,³³ *Van de Water v Staatsecretarías van Financien*,³⁴ *C&CE v Corbitt*,³⁵ *Technip Coflex Offshore Ltd v HMRC*.³⁶

HMRC

81. HMRC's case is, essentially, that Butlers (i) breached the Customs authorisation procedure under which they agreed to operate, (ii), moved Goods from their customs warehouse to other excise warehouses, (iii) thus became liable for customs duty and import VAT which they eventually paid, (iv) thus released the Goods into free circulation for consumption, (v) engaged in irregular importation, (vi) triggered an excise duty point for which they are liable as there was no excise duty suspension arrangement in place, (vii) by making an admission of a technical breach is simply making an admission of liability, and (viii) no question of best judgment/unreasonableness arises because the assessment under appeal was not made under section 12(1) of the FA 1994. The assessment under appeal in this case was made under section 12(1A) of the FA 1994 which does not refer to best judgment. Subject to various statutory exceptions, the tribunal is not entitled to entertain judicial review type arguments.

82. These arguments were largely based on the 2007 authorisation referred to above, various features of the EU and UK implementing legislation under reference to *Greenalls Management Ltd v CC&E*³⁷ and *Eurogate Distribution GmbH v Hauptzollamt Hamburg-Stadt*.³⁸

83. HMRC now focus their principal argument on the proposition that there was an irregular importation of the Goods because the Goods were not immediately entered into Butlers' excise warehouse (under reference to article 7 of the Excise Duty Directive and Regulation 6(1)(d) of the Holding 2010 Regulations.

84. Mr Anderson also referred to *CCE Ltd v HMRC*,³⁹ *Preston v IRC*,⁴⁰ *R (on app of Wilkinson) v IRC*⁴¹ and various other statutory provisions some of which I mention below.

Discussion

³² *LON* 2001/8043 paragraph 79.

³³ [2012] STC 885.

³⁴ (C-325/99) paras 25, 30 and 36.

³⁵ [1980] STC 231 (CA) [1981] AC 22.

³⁶ 24/6/2005 No 19298.

³⁷ [2005] 1 WLR 1754 paragraphs 5 and 38.

³⁸ C- 28/11, 6 September 2012, Third Chamber.

³⁹ [2015] 1WLR 4043 pars 15-17; 39-43.

⁴⁰ [1985] STC 282.

⁴¹ [2006] STC 270 H of L.

Ms Cowie's evidence

85. I found her to be reliable and credible. She gave evidence in a straightforward manner. She did not accept that Butlers had established that the Goods were subsequently exported to qualifying ships outwith the EU.

5 86. She was cross-examined on this point. Officer Cowie accepted that she did not check to see if goods were exported at all or even whether they arrived at the third party excise warehouses.

10 87. Paragraph 14 of her witness statement was not challenged. That paragraph summarises, following a verification check on 17 June 2014, various breaches of the authorisation upon the terms and conditions of which Butlers was allowed to conduct its business (no excise goods and customs goods marked separately in the warehouse; incorrect use of export procedure codes; stock cards noted as customs warehoused goods with discharges showing direct transfer to Zetland Bonded Stores and United Supplies).

15 88. Butlers led no evidence about the subsequent destination of the Goods. Butlers seems to have assumed that there was no dispute on this point. That assumption was misplaced. In the absence of any agreement on the topic (and there is none), the onus rested on Butlers to lead evidence on the point if they considered it to be relevant and material to their success in the appeal. Butlers chose not to give evidence and remained silent (evidentially) throughout the proceedings. Ms Cowie was not cross
20 examined on either of the two ECMS documents admitted in accordance with my Directions dated 9 May 2016, following the application to amend the grounds of appeal discussed above.

25 89. If this were a critical part of Butlers' appeal, it should have led evidence about it to establish the facts. It did not do so, but simply made an assumption relying on the somewhat ambiguous language of some correspondence.

30 90. Even if the Goods were exported outwith the EU or to qualifying ships, it makes no difference to the merits of the appeal. Rather, it might have a bearing on any application made under the Excise Goods (Drawback) Regulations 1995. These regulations proceed on the basis that the goods in question are chargeable to excise duty.⁴² As Butlers dispute the chargeability of the Goods to excise duty, the possibility of drawback must be put to one side and cannot feature as part of the present appeal.

35 91. In these circumstances, I cannot make any findings of fact about the subsequent disposal of the Goods or any part of them from the excise warehouses of Butlers beyond reaching Zetland Bond and United Supplies Ltd. Accordingly, all Butlers' arguments, so far as relying on the making of such findings of fact, fall away.

⁴² Regulation 3.

92. I was also referred to *Sunico*. It was a claim for damages by HMRC arising out of an MTIC fraud. The passages cited⁴³ relate to the drawing of inferences from the absence or silence of a witness who might have been expected to have relevant, material evidence to give on an issue. This does not assist Butlers.

5 93. I was also referred to *Nichols v HMRC*⁴⁴ in which the tribunal was contemplating issuing directions to close an enquiry. The tribunal correctly observed, following earlier authority, that if a party chooses to call no evidence he will lose the issues on which he bears the burden unless he can make his case through his opponent's evidence. This case, too, does not assist Butlers.

10 **Excise Duty Point**

94. The background to this appeal is that Butlers failed to keep proper stock and other records in terms of its customs warehousing authorisation as required in terms of the CCC article 105, the Implementing Regulations article 528 and related domestic legislation. Butlers does not dispute this.

15 95. It is common ground that the respective customs control and excise control regimes are legally and practically separate. It is also common ground that it is not possible for goods held under a customs duty suspension arrangement also to be held under an excise duty suspension arrangement.⁴⁵ The appropriate procedure in terms of regulation 10 of EWER would have been to discharge the Goods from customs
20 warehousing control, on form C88 and enter them in the stock records of the excise warehouse. This was not done. At no stage did Butlers ever enter the Goods into its excise warehouse records in terms of regulation 10, 11 and 12 of EWER.

96. The, or at least one, result of this was that Butlers failed to discharge the Goods from customs warehousing control giving rise to either an irregular importation
25 triggering a customs debt or creating a duty point on the unlawful removal of goods from a customs warehouse in terms of article 203 of the CCC. That liability was not initially disclosed or paid.

97. The European legislation and the UK legislation implementing it in relation to both customs and excise duties are complex and detailed. However, the essential
30 principles are clear, namely HMRC are responsible for (i) authorising, subject to appropriate conditions, suitable persons to carry on the business of customs and/or excise warehousekeepers receiving, holding and distributing *inter alia* excise goods whether by way of importation or otherwise, (ii) administering the system in which that process operates, (iii) monitoring the operation of the system, to ensure that it
35 complies with the regulatory framework and the detailed operational terms and conditions upon which warehousekeepers are authorised to carry on business (iv) the levying and collection of customs duties and excise duties, and (v) the protection of

⁴³ paragraphs 91–101.

⁴⁴ [2016] UKFTT 155 (TCC) at paragraph 21.

⁴⁵ Excise Duty Directive, article 2(b) and 4(7); Holding 2010 Regulations regulation 3(1).

the public interest in seeing that the public revenue is duly protected by compliance with the relevant legislation and authorised procedures.

5 98. The legislative regime stemming from European and UK legislation emphasise the importance of keeping proper records.⁴⁶ These are particularly detailed in EWER which are still largely in force, although they have been subject to amendment.

10 99. The principles set forth in the Excise Duty Directive 2008 were implemented by the Holding 2010 Regulations. Reference may be made to the definitions in regulation 3(1) of the Holding 2010 Regulations of "customs suspensive procedure or arrangement", "duty suspension arrangement", "excise goods," "place of importation" (the place where excise goods are when they are released for free circulation) which largely mirror the definitions in the Excise Duty Directive.

15 100. For the purpose of the Holding 2010 Regulations, a movement of excise goods under a duty suspense arrangement starts when the goods leave a tax warehouse or are released for free circulation. By regulation 5, there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom. By regulation 6, excise goods are released for consumption at the time when *inter alia* the goods are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement. For this purpose, importation means *inter alia* the release of excise goods from a customs suspensive procedure or arrangement.⁴⁷

20 101. By regulation 7 of the Holding 2010 Regulations, excise goods leave a duty suspension arrangement when among other things they leave a tax warehouse or are otherwise available for consumption, for there is a contravention of, or failure to comply with, any requirement relating to the duty suspension arrangement.⁴⁸ By regulation 12, the liability to pay the excise duty when the goods are released for consumption through importation under regulation 6(1)(d) includes irregular importation.

25 102. Here, Butlers has been authorised to operate a customs duty warehouse and an excise duty warehouse from the same physical premises in accordance with various terms and conditions which they accepted by the latest in 2007.

30 103. Following verification checks in 2014, HMRC have identified that between about July 2012 and June 2014 Butlers transferred about 8 million cigarettes to third-party purchasers who operated excise warehouses in breach of the authorisation procedures under which Butlers were entitled to dispatch the goods. In particular, they did so without paying customs duty amounting in total to £75,479.04, and import VAT of £409,169.49.

⁴⁶ The CCC imposes a strict supervision regime; see *FFG Hillebrand v HMRC*, Custom Duties Cases /C00242, 17/7/2007 at paragraph 66.

⁴⁷ Regulation 6(1)(d) & (2).

⁴⁸ Regulation 7(1)(i).

104. These breaches created excise duty points. Butlers is liable to pay excise duty by virtue of regulation 6(1)(d) of the Holding 2010 Regulations.

105. Butlers do not dispute that the customs suspension arrangements relating to the Goods ended improperly. They have not provided any proper explanation as to why this occurred in the light of the clear terms under which they were authorised to operate their business. They have led no evidence and remain silent. They have not explained why liability for excise duty should not follow liability for customs duty and import VAT. They have suggested that liability for excise duty is simply a technicality but they have not explained why beyond raising the question of drawback. Drawback is not an issue in this appeal, but maybe something to be considered on another occasion.

106. The movement of the Goods from Butler's customs warehouse amounted to releasing the Goods into circulation. This triggered a customs debt and the VAT liability.

107. Butlers' admitted failure to follow the proper procedures for importation amounted to irregular importation by virtue of article 7(1) of the Excise Duty Directive and regulation 6(1) of the Holding 2010 Regulations; an excise duty point was triggered.

108. None of the arguments advanced on behalf of Butlers elide these fundamental difficulties. There was simply no excise duty suspension arrangement in place either while the Goods were in Butlers' premises and subject to or possibly subject to customs suspension arrangements, or when they were moved from the premises to the excise warehouse houses of the third parties. It is simply not possible that the Goods could have remained or come to be under excise duty suspension thus avoiding liability for excise duty.

109. This is because article 4.7 of the Excise Duty Directive provides that a duty suspension arrangement means a tax arrangement applied to *inter alia* the holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended. Regulation 3(1) of the Holding 2010 Regulations provides essentially the same definition.

110. As article 203 of the CCC was infringed (customs debt on importation incurred through the unlawful removal from customs supervision of goods liable to import duties), this was an irregular importation within article 72(d) of the Excise Duty Directive which is reflected in regulations 5 and 6(1)(d) and (2) of the Holding 2010 Regulations. Liability to pay the excise duty arises by virtue of regulation 12 (2) of the Holding 2010 Regulations.

111. Had Butlers proposed a different procedure and intimated their proposal to HMRC in accordance with the terms of their authorisation they may not have been authorised to proceed with the transactions at all. However, they chose to proceed and must therefore take the consequences.

112. Butlers has not established that the Goods were entered into their excise warehouse in the first place. Accordingly, any purported movement under EMCS does not help and does not remedy the breach of authorisation procedures.

5 113. Immediately before the Goods were dispatched from Butlers' premises, they were not being held under a duty suspension arrangement. The removal of the Goods from the premises did not create such a duty suspension arrangement. Accordingly, an excise duty point was triggered immediately the Goods were dispatched from Butlers' premises. That is the liability for which Butlers has been assessed.

10 114. Butlers broke the rules upon which they were authorised to conduct business at their premises by ignoring or bending them. This was clearly revealed by HMRC's verification checks carried out in 2014. In particular, these revealed that Butlers failed to put the Goods into its own excise warehouse in terms of regulation 10 EWER and Holding 2010 Regulations, regulation 34. Thus, the Goods were not entered into Butlers' excise warehouse records, or legibly or uniquely marked in terms
15 of regulations 11 and 12 of EWER.

115. In these circumstances, the Goods could not be moved from Butlers' premises (under a duty suspension arrangement). As there was no excise duty suspension arrangement, there was irregular importation in terms of article 7.(2)(d) of the Excise Duty Directive 1988, regulation 6(1)(d), and 12(2) Holding 2010 Regulations. An
20 excise duty point therefore arose in terms of article 7(1) & (2)(d) of the Excise Duty Directive 1988, and regulations 5, 6(1)(d), 6(2)(b), and 12(2) of the Holding 2010 Regulations.

116. The measures deployed by Butlers did not create an excise duty suspension point. Accordingly, liability for excise duty was triggered under article 8(1)(d) of the
25 Excise Duty Directive and regulation 12(1) of the Holding 2010 Regulations.

117. I have been referred to a number of cases on this branch of the appeal. *Eurogate* notes that customs warehousing procedure is a suspensive procedure. The customs debt is incurred at the moment when the obligation whose non fulfilment gives rise to it ceases to be met or at the moment when the goods are placed under the
30 customs procedure concerned and it is subsequently established that a condition governing the placing of the goods under that procedure was not in fact fulfilled.⁴⁹

118. The case concerned delayed entries of the removal from the customs warehouse in question in the stock records. At paragraph 27, the Court noted that the obligation to keep stock records of goods placed under the customs warehousing procedure is an
35 essential obligation connected with that system. At paragraphs 32-35, the Court observed that the customs warehousing procedure implies the grant of conditional benefit which cannot be granted if the related conditions (delayed entry in the stock records) are not respected.

⁴⁹ paragraph 8 – Article 204 of the Customs Code.

119. This case provides a clear rationale for the imposition of customs duty in the present appeal and for the liability for excise duty as a consequence of the removal of goods out with any suspense procedure.

5 120. *Wandel* holds that removal embraces any withdrawal from authorised storage of goods subject to customs supervision without the authorisation of the customs authority and gives rise to a customs debt on importation.⁵⁰

10 121. *Hamann* reaffirmed the well-established principle that the concept of removal from customs supervision encompassed any act or omission the result of which was to prevent the competent customs authority, if only for a short time, from gaining access to goods under customs supervision and for monitoring those goods. This follows from the CCC which provides that supervision by customs authorities means action taken in general with a view to ensuring that customs rules and other provisions applicable to goods subject to customs supervision are observed. Control by customs authorities means a performance of specific acts such as examining goods, verifying the existence and authenticity of documents, examining the accounts of undertakings and other records, inspecting means of transport, inspecting luggage and other goods carried by or on persons and carrying out official enquiries and other similar acts with a view to ensuring that customs rules and other provisions applicable to goods subject to customs supervision are observed. It is the infringement of these principles or at least some of them, which Butlers cannot dispute, and which has led to the making of the assessment under appeal. This case does not assist Butlers' appeal.

20 122. There was some reference in the proceedings to "registered consignors". These are the subject of approval and registration under regulation 30 of the Holding 2010 Regulations. However, these are revenue traders who wish only to dispatch excise goods under duty suspension arrangements on their release for free circulation. Butlers was not said to have been acting as or even dealing with registered consignors. The customs and excise regimes relating to registered consignors is not, therefore, relevant.

30 **Best Judgment/Reasonableness**

35 123. The First-tier Tribunal is a creature of statute. Subject to limited statutory exceptions (not applicable here), it has no judicial review jurisdiction.⁵¹ It has no inherent power to review alleged procedural unfairness on the part of HMRC or other *Wednesbury* reasonableness arguments. That is a matter for judicial review in the ordinary courts.

⁵⁰ paragraph 47 and 50.

⁵¹ *HMRC v Hok Ltd* [2013] STC 225 (TCC) at paragraphs 36, 40 and 56; *HMRC v Race* [2014] UKUT 331 (TCC) para 35; *BT Pension Scheme v HMRC* [2015] EWCA Civ. 713 paragraphs 133-143. *CC & C Ltd HMRC* [2015] 1 WLR] 4043 at page paragraphs 39-45.

124. Accordingly, even if there were any merit in Butlers' argument that the decision to assess was not made to best judgment or somehow unreasonable (in the judicial review sense), it is not open to me to adjudicate on it as I simply have no jurisdiction to do so.

5 125. The statutory basis of the appeal before me is section 16(5) of the Finance Act 1994. That is a full appellate jurisdiction. No question of best judgment or judicial review type reasonableness arises here.

10 126. However, if I had been bound to consider this line of argument, I would have rejected it. None of the matters raised by Butlers, either individually or collectively, justifies the conclusion that, in making the assessment, HMRC failed to do so to the best of their judgment or acted unreasonably or irrationally.

15 127. In support of their argument, Butlers sought to assert that the Goods would not be consumed in the UK or even within the EU. However, it led no evidence, whether by records or otherwise, to establish this fact (which was not agreed), the onus lying on Butlers to do so. This line of argument therefore cannot support the challenge to the reasonableness of the assessment.

20 128. Butlers also argued that any excise duty due could and should have been remitted by way of drawback claims. However, such a drawback claim proceeds, as I have explained, upon the existence of liability to pay duty (which Butlers currently deny). In addition, Butlers has not established in these proceedings that any drawback claim has been made, although the matter was raised in the reviewing officer's letter dated 19 January 2015. Even if Butlers had some form of legitimate expectation (which they do not, on the material before me) that, somehow, these proceedings would be resolved by set-off of a proposed drawback claim, such legitimate
25 expectation could be enforced only through a process of judicial review.⁵² Accordingly, this line of argument cannot support the challenge to the reasonableness of the assessment. As already noted, the question of drawback must be put to one side for purposes of this appeal.

30 129. Finally, Butlers assert that an adverse decision in this appeal will have serious financial consequences for Butlers in relation to liability for duty which would normally be passed on to the consumer. In my view, these considerations are irrelevant. It would have been well-nigh impossible for HMRC to contemplate, when making the assessment, what the financial effect of the making of the assessment might have on Butlers' trading and profitability. Accordingly, this line of argument
35 cannot support the challenge to the reasonableness of the assessment.

130. My attention was also drawn to the distinction between rationality and reasonableness drawn by Lord Sumption in *Hayes v Willoughby*.⁵³ The facts, as I have found them to be, justify the decision to make the assessment. There is a clear logical connection between these facts and the decision, which is not said to have

⁵² *Preston v IRC* [1985] STC 282.

⁵³ [2013] 1 WLR 935 at 943, paragraph 14. [2013] 1 WLR 935 at 943, paragraph 14.

been made in bad faith or in an arbitrary or capricious manner. The basis on which the decision to assess was sound. No question of irrationality or unreasonableness arises.

5 131. In summary, having regard to the findings of fact as I have found them to be and all the documentary material produced, there is, in any event, no basis whatsoever for concluding (even if I could entertain this ground of appeal) that HMRC acted in any respect unreasonably, contrary to best judgment, or irrationally in making the assessment.

10 132. Furthermore, the nature of the discretion being exercised here by HMRC is one which cannot justifiably be criticised. That discretion is a managerial, overarching discretion, the function of which is to collect taxes in accordance with the law and to protect the public revenue. In *Wilkinson*, the Court of Appeal noted that one of the primary tasks of HMRC is to recover those taxes which Parliament has decreed shall be paid. HMRC set about that task pragmatically and have regard to principles of
15 good management; concessions may be made where these will facilitate the overall task of tax collection; however, the managerial discretion is as to the best manner of obtaining for the national exchequer the highest net return that is practicable.⁵⁴ In the House of Lords, Lord Hoffmann, too, emphasised HMRC's role in the collection of every part of inland revenue giving them a wide managerial discretion to obtain the
20 highest net return that is practicable having regard to the staff available and the cost of collection.⁵⁵

25 133. I was referred to some further authorities. *Adam* related to an ancillary matter⁵⁶ to which the statutory quasi-judicial review jurisdiction applied under section 16(4) of the FA 1994. The tribunal's comments at paragraphs 51 and 52 were unnecessary for the decision but were made in the background of the quasi-statutory judicial review jurisdiction in the context of statutory decisions to refuse applications for approval of a warehouse.

30 134. *Easter Hatton* was an appeal against a landfill tax assessment. The tribunal raised the question of the exercise of discretion and followed its own reasoning in *Technip Coflex*. There was no discussion of the authorities on the scope of the tribunal's jurisdiction.

35 135. Nor was there any such discussion in *Technip Coflex*. That was a bad debt VAT relief claim by a repayment trader where the supply in question was outwith the scope of VAT. The tribunal took the view that HMRC had a discretion in the matter of making an assessment. The tribunal relied on the long-standing Inland Revenue practice not to collect tax which taxpayer has clearly satisfied the revenue that no tax is due. Since HMRC did not exercise any discretion and paid no attention to the circumstances of the case, the assessment could not stand. There was no discussion of

⁵⁴ paragraphs 43 – 46.

⁵⁵ paragraphs 20-21.

⁵⁶ paragraphs 43 to 46 and 79.

the scope of the tribunal's jurisdiction. While this was no doubt a wise decision, the question of the tribunal's jurisdiction was not explored. I cannot rely on this case in the light of later authorities.

5 136. *TDG (UK) Ltd* was another appeal against the refusal to grant an application for approval of the appellant's excise warehouse. The appeal concerned an ancillary matter⁵⁷ and the quasi-judicial review statutory jurisdiction applied.⁵⁸

10 137. *Best Buy* was a VAT case in which the jurisdiction of the tribunal was appellate. However, it was common ground that the jurisdiction in respect of the relevant statutory decision was supervisory in that in the First-tier Tribunal could not substitute its own decision but could only decide whether the statutory discretion had been exercised reasonably⁵⁹. The Upper Tribunal stated that the reasons for the tribunal's conclusion had not been adequately explained⁶⁰. The appeal was remitted to the First-tier Tribunal to make appropriate findings of fact, if necessary with further evidence.

15 138. Accordingly, this case does not provide support for the view that the assessment in this appeal is reviewable on the basis of a judicial review type challenge before this tribunal.

20 139. *Tower McCashback*⁶¹ discussed among other things the scope of challenge which may be made to the conclusion reached in a closure notice, noting⁶² that the tribunal must form its own view on the law without being restricted to what the revenue state in their conclusion, or the taxpayer states in the notice of appeal. This, too, does not assist *Butlers* and in particular does not trench on the tribunal's statutory jurisdiction.

Summary

25 140.

30 **1) Butlers failed to discharge goods from customs warehousing control giving rise to either an irregular importation triggering a customs debt or creating a duty point on the unlawful removal of goods from a customs warehouse in terms of Article 203 of the CCC. That liability was not initially disclosed or paid.**⁶³

⁵⁷ paragraph 36.

⁵⁸ paragraphs 68-70 and 165.

⁵⁹(paragraph 49.

⁶⁰ paragraph 72.

⁶¹ [2011] 2 AC 457.

⁶² at page 469, paragraph 18.

⁶³ Paragraph 96.

2) Butlers' admitted failure to follow the proper procedures for importation amounted to irregular importation by virtue of Article 7(1) of the Excise Duty Directive and Regulation 6(1) of the Holding 2010 Regulations and an excise duty point was triggered.⁶⁴

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3) None of the arguments advanced on behalf of Butlers elide these fundamental difficulties. There was simply no excise duty suspension arrangement in place either while the Goods were in Butler's premises and subject to or possibly subject to customs suspension arrangements, or when they were moved from the premises to the excise warehouse houses of the third parties. It is simply not possible that the Goods could have remained or come to be under excise duty suspension thus avoiding liability for excise duty.⁶⁵

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4) The Goods could not be moved from Butlers'(under a duty suspense arrangement). As there was no excise duty suspension arrangement, there was irregular importation in terms of Article 7.(2)(d) of the Excise Duty Directive 1988, Regulation 6(1)(d), 12(2) Holding 2010 Regulations. An Excise Duty Point therefore arose in terms of Article 7(1),(2)(d) of the Excise Duty Directive 1988, and regulations 5, 6(1)(d), 6(2)(b), and 12(2) of the Holding 2010 Regulations.⁶⁶

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5) Immediately before the Goods were dispatched from Butlers' premises they were not being held under a duty suspension arrangement. The removal of the Goods from the premises did not create such a duty suspension arrangement. Accordingly, an excise duty point was triggered immediately the Goods were dispatched from Butlers' premises. That is the liability for which Butlers have been assessed.⁶⁷

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6) The First-tier tribunal is a creature of statute. Subject to limited statutory exceptions (not applicable here), it has no judicial review jurisdiction.⁶⁸ It has no inherent power to review alleged procedural unfairness on the part of HMRC or other *Wednesbury* reasonableness arguments. That is a matter for judicial review in the ordinary courts.⁶⁹

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7) Accordingly, even if there were any merit in Butlers' argument that the decision to assess was not made to best judgment or somehow

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⁶⁴ Paragraph 107.

⁶⁵ Paragraph 108.

⁶⁶ Paragraph 115.

⁶⁷ Paragraph 118.

⁶⁸ (*HMRC v Hok Ltd* [2013] STC 225 (TCC) at paragraphs 36, 40 and 56; *HMRC v Race* [2014] UKUT 331 (TCC) para 35; *Hayes v Willoughby* [2013] 1 WLR 935 at paragraph 141; *BT Pension Scheme v HMRC* [2015] EWCA Civ. 713 paragraphs 133-143.

⁶⁹ Paragraph 123.

unreasonable (in the judicial review sense), it is not open to me to adjudicate on it as I simply have no jurisdiction to do so.⁷⁰

5 **8) Having regard to the findings of fact as I have found them to be, and all the documentary material produced, there is, in any event, no basis whatsoever for concluding (even if I could entertain this ground of appeal) that HMRC acted in any respect unreasonably, contrary to best judgment, or irrationally in making the assessment.**⁷¹

Disposal

10 141. **The appeal is dismissed.**

15 142. 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.

20

**J GORDON REID QC FCI Arb
TRIBUNAL JUDGE**

RELEASE DATE: 14 July 2016

⁷⁰ Paragraph 124.

⁷¹ Paragraph 131.

APPENDIX

Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products

Official Journal L 76, 23/03/1992 p. 1

5

Article 3

1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

- mineral oils,
- alcohol and alcoholic beverages,
- manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

Subject to the same proviso, Member States shall also retain the right to levy taxes on the supply of services which cannot be characterized as turnover taxes, including those relating to products subject to excise duty.

Article 5

1. The products referred to in Article 3 (1) shall be subject to excise duty at the time of their production within the territory of the Community as defined in Article 2 or of their importation into that territory.

'Importation of a product subject to excise duty' shall mean the entry of that product into the territory of the Community, including the entry of such a product from a territory covered by Article 2 (1), (2) and (3) or from the Channel Islands.

However, where the product is placed under a Community customs procedure on entry into the territory of the Community, importation shall be deemed to take place when it leaves the Community customs procedure.

2. Without prejudice to national and Community provisions regarding customs matters, when products subject to excise duty coming from or going to third countries are under a Community customs procedure other than release for free circulation or are placed in a free zone or a free warehouse, the excise duty on them shall be deemed to be suspended.

Article 6

1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14 (3).

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

- (a) any departure, including irregular departure, from a suspension arrangement;
- (b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;
- (c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.

Article 14

1. Authorized warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or force majeure and established by the authorized of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the traders referred to in Article 16 during the transport of products under excise duty suspension arrangements.

2. Losses referred to in paragraph 1 occurring during the intra-Community transport of products under excise duty suspension arrangements must be established according to the rules of the Member State of destination.

3. Without prejudice to Article 20, the duty on shortages other than the losses referred to in paragraph 1 and losses for which the exemptions referred to in paragraph 1 are not granted shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses, duly established by the competent authorities, occurred, or if necessary at the time the shortage was recorded.

Council Regulation (EEC) No 2913/92 (“the Community Customs Code”)

5 Article 57

Where customs authorities find that goods have been brought unauthorized into the customs territory of the Community or have been withheld from customs surveillance, they shall take any measures necessary, including sale of the goods, in order to regularize their situation.

10 Article 69

1. Transport of the goods to the places where they are to be examined and samples are to be taken, and all the handling necessitated by such examination or taking of samples, shall be carried out by or under the responsibility of the declarant. The costs incurred shall be borne by the declarant.

15

2. The declarant shall be entitled to be present when the goods are examined and when samples are taken. Where they deem it appropriate, the customs authorities shall require the declarant to be present or represented when the goods are examined or samples are taken in order to provide them
5 with the assistance necessary to facilitate such examination or taking of samples.

3. Provided that samples are taken in accordance with the provisions in force, the customs authorities shall not be liable for payment of any compensation in respect thereof but shall bear the costs of their analysis or
10 examination.

Article 70

1. Where only part of the goods covered by a declaration are examined, the results of the partial examination shall be taken to apply to all the goods covered by that declaration.

15 However, the declarant may request a further examination of the goods if he considers that the results of the partial examination are not valid as regards the remainder of the goods declared.

2. For the purposes of paragraph 1, where a declaration form covers two or more items, the particulars relating to each item shall be deemed to
20 constitute a separate declaration.

Article 76

1. In order to simplify completion of formalities and procedures as far as possible while ensuring that operations are conducted in a proper manner, the customs authorities shall, under conditions laid down in accordance
25 with the committee procedure, grant permission for:

(a) the declaration referred to in Article 62 to omit certain of the particulars referred to in paragraph 1 of that Article for some of the documents referred to in paragraph 2 of that Article not to be attached thereto;

30 (b) a commercial or administrative document, accompanied by request for the goods to be placed under the customs procedure in question, to be lodged in place of the declaration referred to in Article 62;

35 (c) the goods to be entered for the procedure in question by means of an entry in the records; in this case, the customs authorities may waive the requirement that the declarant presents the goods to customs.

The simplified declaration, commercial or administrative document or entry in the records must contain at least the particulars necessary for identification of the goods. Where the goods are entered in the records, the date of such entry must be included.

5 2. Except in cases to be determined in accordance with the committee procedure, the declarant shall furnish a supplementary declaration which may be of a general, periodic or recapitulative nature.

3. Supplementary declarations and the simplified declarations referred to in subparagraphs 1 (a), (b) and (c), shall be deemed to constitute a single,
10 indivisible instrument taking effect on the date of acceptance of the simplified declarations; in the cases referred to in subparagraph 1 (c), entry in the records shall have the same legal force as acceptance of the declaration referred to in Article 62.

4. Special simplified procedures for the Community transit procedure
15 shall be laid down in accordance with the committee procedure.

Article 79

Release for free circulation shall confer on non-Community goods the customs status of Community goods.

20 It shall entail application of commercial policy measures, completion of the other formalities laid down in respect of the importation of goods and the charging of any duties legally due.

Article 86

25 Without prejudice to the additional special conditions governing the procedure in question, the authorization referred to in Article 85 and that referred to in Article 100 (1) shall be granted only:

- to persons who offer every guarantee necessary for the proper conduct of the operations;
- where the customs authorities can supervise and monitor the
30 procedure without having to introduce administrative arrangements disproportionate to the economic needs involved.

“Article 98

1. The customs warehousing procedure shall allow the storage in a customs warehouse of:

(a) non-Community goods, without such goods being subject to import duties or commercial policy measures;

5 (b) Community goods, where Community legislation governing specific fields provides that their being placed in a customs warehouse shall attract the application of measures normally attaching to the export of such goods.

2. Customs warehouse means any place approved by and under the supervision of the customs authorities where goods may be stored under the conditions laid down.

10 3. Cases in which the goods referred to in paragraph 1 may be placed under the customs warehousing procedure without being stored in a customs warehouse shall be determined in accordance with the committee procedure.

Article 99

15 A customs warehouse may be either a public warehouse or a private warehouse.

'Public warehouse' means a customs warehouse available for use by any person for the warehousing of goods;

20 'private warehouse' means a customs warehouse reserved for the warehousing of goods by the warehousekeeper.

The warehousekeeper is the person authorized to operate the customs warehouse.

25 The depositor shall be the person bound by the declaration placing the goods under the customs warehousing procedure or to whom the rights and obligations of such a person have been transferred.

Article 100

1. Operation of a customs warehouse shall be subject to the issue of an authorization by the customs authorities, unless the said authorities operate the customs warehouse themselves.

30 2. Any person wishing to operate a customs warehouse must make a request in writing containing the information required for granting the authorization, in particular demonstrating that an economic need for warehousing exists. The authorization shall lay down the conditions for operating the customs warehouse.

3. The authorization shall be issued only to persons established in the Community.

Article 101

The warehousekeeper shall be responsible for:

- 5 (a) ensuring that while the goods are in the customs warehouse they are not removed from customs supervision;
- (b) fulfilling the obligations that arise from the storage of goods covered by the customs warehousing procedure; and
- (c) complying with the particular conditions specified in the authorization.”

10 Article 105

The person designated by the customs authorities shall keep stock records of all the goods placed under the customs warehousing procedure in a form approved by those authorities. Stock records are not necessary where a public warehouse is operated by the customs authorities.

- 15 Subject to the application of Article 86 the customs authorities may dispense with stock records where the responsibilities referred to in Article 101 (a) and/or (b) lie exclusively with the depositor and the goods are placed under that procedure on the basis of a written declaration forming part of the normal procedure or an administrative document in accordance
- 20 with Article 76 (1) (b).

Article 107

Goods placed under the customs warehousing procedure shall be entered in the stock records provided for in Article 105 as soon as they are brought into the customs warehouse.

25

“Article 203

1. A customs debt on importation shall be incurred through:
- 30 - the unlawful removal from customs supervision of goods liable to import duties.
2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be:

- the person who removed the goods from customs supervision,

- any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

- any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

- where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.”

Article 204

1. A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed, or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure.

Article 266

1. To enable the customs authorities to satisfy themselves as to the proper conduct of operations, the holder of the authorization referred to in Article 263 shall:

- (a) in the cases referred to in the first and third indents of Article 263;
 - (i) where the goods are released for free circulation upon their arrival at the place designated for that purpose:
 - duly notify the customs authorities of such arrival in the form and the manner specified by them, for the purpose of obtaining release of the goods, and
 - enter the goods in his records;
 - (ii) where release for free circulation is preceded by temporary storage of the goods within the meaning of Article 50 of the Code at the same place, before expiry of the time-limit set under Article 49 of the Code:
 - duly notify the customs authorities, in the form and the manner specified by them, of his desire to have the goods released for free circulation, for the purpose of obtaining release of the goods, and
 - enter the goods in his records;
- (b) in the cases referred to in the second indent of Article 263:
 - duly notify the customs authorities, in the form and the manner specified by them, of his desire to have the goods released for free circulation, for the purpose of obtaining release of the goods, and
 - enter the goods in his records.

The notification referred to in the first indent shall not be required where the goods to be released for free circulation have already been placed under the customs warehousing procedure in a type D warehouse;

- (c) in the cases referred to in the fourth indent of Article 263, upon arrival of the goods at the place designated for that purpose:
 - enter the goods in his records;

(d) make available to the customs authorities, from the time of the entry in the records referred to in points (a), (b) and (c), all documents, the production of which is required for the application of the provisions governing release for free circulation.

2. On condition that checks on the proper conduct of operations are not thereby affected, the customs authorities may:

(a) permit the notification referred to in points (a) and (b) of paragraph 1 to be effected as soon as the arrival of the goods becomes imminent;

(b) in certain special circumstances, where the nature of the goods in question and the rapid turnover so warrant, exempt the holder of the authorization from the requirement to notify the competent customs office of each arrival of goods, provided that he supplies the said office with all the information it considers necessary to enable it to exercise its right to examine the goods should the need arise.

In this case, entry of the goods in the records of the person concerned shall be equivalent to release.

3. The entry in the records referred to in points (a), (b) and (c) of paragraph 1 may be replaced by any other formality offering similar guarantees stipulated by the customs authorities. The entry shall indicate the date on which it is made and the particulars necessary for identification of the goods.

“Article 511

The authorisation shall specify whether and under which conditions the movement of goods or products placed under suspensive arrangements between different places or to the premises of another holder may take place without discharge of the arrangements (transfer), subject, in cases other than temporary importation, to the keeping of records.

Transfer shall not be possible where the place of departure or arrival of the goods is a type B warehouse.

Article 512

1. Transfer between different places designated in the same authorisation may be undertaken without any customs formalities.

15

2. Transfer from the office of entry to the holder's or operator's facilities or place of use may be carried out under cover of the declaration for entry for the arrangements.

5 3. Transfer to the office of exit with a view to re-exportation may take place under cover of the arrangements. In this case, the arrangements shall not be discharged until the goods or products declared for re-exportation have actually left the customs territory of the Community.

Article 513

10 Transfer from one holder to another can only take place where the latter enters the transferred goods or products for the arrangements under an authorisation to use the local clearance procedure. Notification to the customs authorities and entry in the records of the goods or products referred to in Article 266 shall take place upon their arrival at the premises of the second holder. A supplementary declaration need not be required.

15 In the case of temporary importation, the transfer from one holder to another may also take place where the latter enters the goods under the arrangements by means of a customs declaration in writing using the normal procedure.

20 The formalities to be carried out are laid down in Annex 68. Upon receipt of the goods or products, the second holder shall be obliged to enter them for the arrangements.”

Section 3

Stock records

Article 528

30 1. In warehouses of type A, C, D and E, the person designated to keep the stock records shall be the warehousekeeper.

2. In warehouses of type F, the operating customs office shall keep the customs records in place of stock records.

35 3. In type B warehouses, in place of stock records, the supervising office shall keep the declarations of entry for the arrangements.

40

Council Directive 2008/118/EC (“The Excise Duty Directive”)

45 “Whereas
...

5 (7) Since suspensive procedures under Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code provide for adequate monitoring whilst excise goods are subject to the provisions of that Regulation, there is no need for the separate application of an excise monitoring system for the time that the excise goods are subject to a Community customs suspensive procedure or arrangement.”

10 (8) 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.

15 (9) Since excise duty is a tax on the consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost.

20 (11) In the event of an irregularity, excise duty should be due in the Member State on whose territory the irregularity has been committed which has led to the release for consumption or, if it is not possible to establish where the irregularity has been committed, it should be due in the Member State where it has been detected. Where excise goods do not arrive at their destination and no irregularity has been detected, the irregularity shall be deemed to have occurred in the Member State of dispatch.

25

30

Article 2

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

35

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

40 (b) their importation into the territory of the Community.

“Article 3

1. The formalities laid down by the Community customs provisions for the entry of goods into the customs territory of the Community shall apply *mutatis mutandis* to the entry of excise goods into the Community from a territory referred to in Article 5(2).

45

2. The formalities laid down by the Community customs provisions for the exit of goods from the customs territory of the Community shall apply *mutatis mutandis* to the exit of excise goods from the Community to a territory referred to in Article 5(2).

3. By way of derogation from paragraphs 1 and 2, Finland shall be authorised, for movements of excise goods between its territory as defined in Article 4(2) and the territories referred to in Article 5(2)(c), to apply the same procedures as those applied for such movements on its territory as defined in Article 4(2).
- 5 4. Chapters III and IV shall not apply to exercise goods covered by a customs suspensive procedure or arrangement.”

Article 4

10 For the purpose of this Directive as well as its implementing provisions, the following definitions shall apply:

- 15 4. “authorised warehousekeeper” means a natural or legal person authorised by the competent authorities of a Member State, in the course of his business, to produce, process, hold, received or dispatch excise goods under a duty suspension arrangement in a tax warehouse;
5. “Member State” and “territory of a Member State” means the territory of each Member State of the Community to which the Treaty is applicable, in accordance with Article 299 thereof, with the exception of third territories;
- 20 6. “Community” and “territory of the community” means the territories of the Member States as defined in point 2;
7. “third territories” means the territories referred to in Article 5(2) and (3);
8. “third country” means any State or territory to which the Treaty is not applicable;
- 25 9. “customs suspensive procedure or arrangement” means any one fo the special procedures as provided for under Regulation (EEC) No 2913/92 relating to the customs supervision to which non-Community goods are subjected upon their entry into the Community customs territory, temporary storage, free zones or free warehouses, as well as any of the arrangements referred to in Article 84(1)(a) of that
- 30 Regulation;
10. “duty suspension arrangement” means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;
11. “importation of excise goods” means the entry into the territory of the
- 35 Community of excise goods unless the goods upon their entry into the Community are placed under a customs suspensive procedure or arrangement, as well as their release from a customs suspensive procedure or arrangement;
12. “registered consignee” means a natural or legal person authroised by the competent authorities of the Member State of destination, in the course of his business
- 40 and under the conditions fixed by those authorities, to receive excise goods moving under a duty suspension arrangement from another Member State;

13. “registered consignor” means a natural or legal person authorised by the competent authorities of the Member State of importation, in the course of his business and under the conditions fixed by those authorities, to only dispatch excise goods under a duty suspension arrangement upon their release for free circulation in accordance with Article 79 of Regulation (EEC) No 2913/92;

14. “tax warehouse” means a place where excise goods are produced, processed, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located.

10

“Article 7

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

15

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.

4. The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or force majeure, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption.

25

For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods.

5 The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

5. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined.

Article 8

- 10 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 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.

SECTION 2

15

Reimbursement and remission

Article 11

In addition to the cases referred to in Article 33(6), Article 36(5), and Article 38(3), as well as those provided for by the Directives referred to in Article 1, excise duty on excise goods which have been released for consumption may, at the request of a person concerned, be reimbursed or remitted by the competent authorities of the Member State where those goods were released of consumption in the situations fixed by the Member States and in accordance with the conditions that Member shall lay down for the purpose of preventing any possible evasion or abuse.

Such reimbursement or remission may not give rise to exemptions other than those provided for in Article 12 or by one of the Directives referred to in Article 1.

Article 16

1. The opening and operation of a tax warehouse by an authorised warehousekeeper shall be subject to authorisation by the competent authorities of the Member State where the tax warehouse is situated.

Such authorisation shall be subject to the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse.

2. An authorised warehousekeeper shall be required to:

- (a) provide, if necessary, a guarantee to cover the risk inherent in the production, processing and holding of excise goods;
- (b) comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated;
- (c) keep, for each tax warehouse, accounts of stock and movements of excise goods;
- (d) enter into his tax warehouse and enter in his accounts at the end of their movement all excise goods moving under a duty suspension arrangement, except where Article 17(2) applies;

SECTION 2

Procedure to be followed on a movement of excise goods under suspension of excise duty

Article 21

1. A movement of excise goods shall be considered to take place under a duty suspension arrangement only if it takes place under cover of an electronic administrative document processed in accordance with paragraphs 2 and 3.

2. For the purposes of paragraph 1 of this Article, the consignor shall submit a draft electronic administrative document to the competent authorities of the Member State of dispatch using the computerised system referred to in Article 1 of Decision No 1152/2003/EC (hereinafter “the computerised system”).

3. The competent authorities of the Member State of dispatch shall carry out an electronic verification of the data in the draft electronic administrative document.

Where these data are not valid, the consignor shall be informed thereof without delay.

5

7. The consignor may cancel the electronic administrative document as long as the movement has not begun under Article 20(1).

8. During the movement under a duty suspension arrangement, the consignor may, using the computerised system, amend the destination to show a new destination which must be one of the destinations referred to in Article 17(1)(a)(i), (ii) or (iii) or, where applicable, in Article 17(2).

That authorised warehousekeeper or that registered consignee shall remain responsible for submitting the report of receipt referred to in Article 24(1).

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3. Paragraphs 1 and 2 shall also apply to movements of excise goods at a zero rate which have not been released for consumption.

20

25

Customs and Excise Management Act 1979 (“CEMA”)

“92 Approval of warehouses

30 (1) The Commissioners may approve, for such periods and subject to such conditions as they think fit, places of security for the deposit, keeping and securing—

(a) of imported goods chargeable as such with excise duty (whether or not also chargeable with customs duty) without payment of the excise duty;

35 (b) of goods for exportation or for use as stores, being goods not eligible for home use;

(c) of goods manufactured or produced in the United Kingdom [or the Isle of Man] and permitted by or under the customs and excise Acts to be warehoused without payment of any duty of excise chargeable thereon;

40 (d) of goods imported into or manufactured or produced in the United Kingdom or the Isle of Man and permitted by or under the customs and excise Acts to be warehoused on drawback,

subject to and in accordance with warehousing regulations; and any place of security so approved is referred to in this Act as an “excise warehouse”.

5 (2) Functions with respect to the approval of warehouses for the purposes of Article 38 of Commission Regulation (EEC) No 3665/87 shall be exercised by the Commissioners; and a warehouse approved by them for such purposes is referred to in this Act as a “victualling warehouse”.

(3) The same place may be approved under this section both as a victualing and as an excise warehouse.

10 (4) Notwithstanding subsection (2) above and the terms of the approval of the warehouse but subject to directions under subsection (5) below, goods of the following descriptions, not being goods chargeable with excise duty which has not been paid, that is to say—

(a) goods originating in member States;

(b) goods which are in free circulation in member States; and

15 (c) goods placed on importation under a customs procedure (other than warehousing) involving the suspension of, or the giving of relief from, customs duties,

may be kept, without being warehoused, in a victualling warehouse.

(5) The Commissioners may from time to time give directions—

20 (a) as to the goods which may or may not be deposited in any particular warehouse or class of warehouse;

(b) as to the part of any warehouse in which any class or description of goods may be kept or secured.

25 (6) If, after the approval of a warehouse as an excise warehouse, the occupier thereof makes without the previous consent of the Commissioners any alteration therein or addition thereto, the making of the alteration or addition shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties).

(7) The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval of any warehouse under this section.

30 (8) Where any person contravenes or fails to comply with any condition imposed or direction given by the Commissioners under this section, his contravention or failure to comply shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties).

93 Regulation of warehouses and warehoused goods

35 (1) The Commissioners may by regulations under this section (referred to in this Act as “warehousing regulations”)—

- (a) prohibit the deposit or keeping of goods in a warehouse except where the occupier of the warehouse has been approved by the Commissioners in accordance with the regulations and where such conditions as may be prescribed in relation to that occupier are satisfied;
- 5 (b) otherwise regulate the deposit, keeping, securing and treatment of goods in a warehouse;
- (c) make provision with respect to goods which are required to be deposited in a warehouse;
- (d) regulate the removal of goods from a warehouse and make provision with respect to goods which have lawfully been permitted to be removed from a warehouse without payment of duty; and
- 10 (e) make provision, in relation to goods which have been warehoused or are required to be deposited in a warehouse with respect to the keeping, preservation and production of records and the furnishing of information.
- 15 (2) Warehousing regulations may, without prejudice to the generality of subsection (1) above, include provisions—
- (a) imposing or providing for the imposition under the regulations of conditions and restrictions subject to which goods may be deposited in secured in, kept in or removed from warehouse or made available there to their owner for any prescribed purpose;
- 20 (b) requiring goods deposited in warehouse to be produced to or made available for inspection by an officer on request by him;
- (c) permitting the carrying out on warehoused goods of such operations as may be prescribed by or allowed under the regulations in such manner and subject to such conditions and restrictions as may be imposed by or under the regulations;
- 25 (d) for determining, for the purpose of charging or securing the payment of duty, the duties of customs or excise and the rates thereof to be applied to warehoused goods (other than goods falling within section 92(2)(b) above) and in that connection—
- 30 (i) for determining the time by reference to which warehoused goods are to be classified;
- (ii) for determining the time at which warehoused goods are to be treated as having been removed from warehouse;
- 35 (iii) for ascertaining the quantity which is to be taken as the quantity of warehoused goods;
- (da) providing for all or any prescribed purposes of the customs and excise Acts—

- (i) for goods to be treated as warehoused where in a prescribed case they are in the custody or under the control of an approved occupier of a warehouse; and
 - (ii) for goods to be treated, at such times before the excise duty point for those goods as may be prescribed or as may be determined under the regulations, as goods which are required to be deposited in a warehouse;
- (db) providing for the revocation of the approval under regulations of any occupier of a warehouse and applying, with modifications, any of the provisions of section 98 below in relation to such a revocation or to cases where such an approval is not renewed;
- (e) enabling the Commissioners to allow goods to be removed from warehouse without payment of duty in such circumstances and subject to such conditions as they may determine;
- (ee) providing that goods which are required to be deposited in a warehouse, which have been lawfully permitted to be removed from a warehouse without payment of duty, are to be treated as if, for all or any prescribed purposes of the customs and excise Acts, they were warehoused;
- (f) permitting goods to be destroyed or abandoned to the Commissioners without payment of customs duty in such circumstances and subject to such conditions as they may determine;
- (fa) requiring goods which are required to be deposited in a warehouse or which have lawfully been permitted to be removed from a warehouse without payment of duty to be accompanied by such documents in such form and containing such particulars as may be prescribed;
- (fb) imposing or providing for the imposition under the regulations of requirements on persons concerned in any prescribed respect with the carriage of such goods to keep and preserve the documents that are required to accompany the goods;
- (fc) imposing or providing for the imposition under the regulations of requirements on a person so concerned to produce or cause to be produced any documents which are required to accompany any goods by virtue of paragraph (fa) above to an officer when required to do so for the purpose of allowing the officer to inspect them, to copy or take extracts from them or to remove them at a reasonable time and for a reasonable period;
- (g) imposing or providing for the imposition under the regulations of requirements on the occupier of a warehouse or the proprietor of goods in a warehouse or goods which have been in or are [required] to be deposited in a warehouse to keep and preserve such records as may be prescribed relating to his occupation of the warehouse or proprietorship of the goods;

5 (h) imposing or providing for the imposition under the regulations of requirements on such an occupier or proprietor to preserve all other records kept by him for the purposes of any relevant business or activity, except any records which (or records of a class which) the Commissioners specify as not needing preservation;

10 (j) imposing or providing for the imposition under the regulations of requirements on such an occupier or proprietor to produce or cause to be produced any records which he has been required to preserve by virtue of paragraph (g) or (h) above to an officer when required to do so for the purpose of allowing the officer to inspect them, to copy or take extracts from them or to remove them at a reasonable time and for a reasonable period;

15 (k) imposing or providing for the imposition under the regulations of requirements on such an occupier or proprietor to furnish the Commissioners with any information relating to any relevant business or activity which they specify as information which they think it is necessary or expedient for them to be given for the protection of the revenue;

20 l) allowing a requirement to preserve any records which has been imposed by virtue of paragraph (h) above to be discharged by the preservation in a form approved by the Commissioners of the information contained in the records, and may contain such incidental or supplementary provisions as the Commissioners think necessary or expedient for the protection of the revenue.

25 In this subsection “relevant business or activity” means, in relation to an occupier or proprietor, any business or activity of his which includes occupation of a warehouse or (as the case may be) proprietorship of goods in a warehouse or goods which have been in or are [required] to be deposited in a warehouse, where the goods are of a kind in which the proprietor trades or deals.

30 (2A) Where any documents or records removed under the powers conferred by subsection [(2)(fc) or (j)] above are lost or damaged the Commissioners shall be liable to compensate their owner for any expenses reasonably incurred by him in replacing or repairing the documents or records.

(3) Warehousing regulations may make different provision for [different cases, including different provision for different occupiers or descriptions of occupier, for] warehouses or parts of warehouses of different descriptions or for goods of different classes or descriptions or of the same class or description in different circumstances.

35 (4) Warehousing regulations may make provision about the removal of goods from one warehouse to another or from one part of a warehouse to another part or for treating goods remaining in a warehouse as if, for all or any prescribed purposes of the customs and excise Acts, they had been so removed; and regulations about the removal of goods may, for all or any prescribed purposes of those Acts, include
40 provision for treating the goods as having been warehoused or removed from warehouse (where they would not otherwise be so treated).

5 (5) Warehousing regulations made by virtue of paragraph (a) or (c) of subsection (2) above may also provide for the forfeiture of goods in the event of non-compliance with any condition or restriction imposed by virtue of that paragraph or in the event of the carrying out of any operation on warehoused goods which is not by virtue of the said paragraph (c) permitted to be carried out in the warehouse.

10 (5A) Warehousing regulations made by virtue of any of paragraphs (fa) to (fc) or (g) to (j) of subsection (2) above may also provide for the forfeiture of the goods in question in the event of any contravention of, or non-compliance with, any requirements imposed by or under the regulations with respect to any documents or records relating to prescribed goods.

(6) If any person fails to comply with any warehousing regulation or with any condition [restriction or requirement] imposed under a warehousing regulation his failure to comply shall attract a penalty under [section 9](#) of the Finance Act 1994 (civil penalties).

15 (7) In this section—

(a) “prescribed” means prescribed by warehousing regulations;

20 (b) references to goods which are [required to be deposited in a warehouse] are references to goods which have been entered for warehousing on importation, which have been removed from a producer's premises for warehousing without payment of duty which are to be warehoused on drawback or which are otherwise to be treated by virtue of subsection (2)(da)(ii) above as goods which are required to be deposited in a warehouse.”

“100G Registered excise dealers and shippers

25 (1) For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as “registered excise dealers and shippers regulations”)—

(a) confer or impose such powers, duties, privileges and liabilities as may be prescribed in the regulations upon any person who is or has been a registered excise dealer and shipper; and

30 (b) impose on persons other than registered excise dealers and shippers, or in respect of any goods of a class or description specified in the regulations, such requirements or restrictions as may by or under the regulations be prescribed with respect to registered excise dealers and shippers or any activities carried on by them.

35 (2) The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements for registration as they may think fit to impose.

(3) In the customs and excise Acts “registered excise dealer and shipper” means a revenue trader approved and registered by the Commissioners under this section.

5 (4) The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under the regulations prescribe.

(5) The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section.

10 (6) The regulations may make provision for treating revenue traders as approved and registered under this section in cases where they are members of a group of companies (within the meaning of the regulations) which is approved and registered in accordance with the regulations.”

Finance Act 1994 (“the 1994 Act”)

15 “12

(1A) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) at the amount due can be ascertained by the Commissioners,

20 the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

...

25 (4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—

(a) subject to subsection (5) below, the end of the period of [4 years] beginning with the time when his liability to the duty arose; and

30 (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.”

35 **Excise Warehousing (Etc) Regulations 1988 (“EWER”)**

“11 Receipt of goods into warehouse

(1) Subject to paragraph (6) below, when goods are warehoused the occupier shall immediately deliver to the proper officer an entry of the goods in such form and containing such particulars as the Commissioners direct.

5 (2) When goods are warehoused the occupier shall take account of the goods and deliver a copy of that account to the proper officer by the start of business on the next day after warehousing that the warehouse is open.

(3) The occupier shall, if there is any indication that the goods may have been subject to loss or tampering in the course of removal to the excise warehouse, immediately inform the proper officer and retain the goods intact for his examination.

10 (4) Except in any case to which the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 apply, the occupier shall, within 5 days of goods being warehoused, send a certificate of receipt for the goods to the person from whom they were received identifying the goods and stating the quantity which has been warehoused.

15 (4A) Where goods are warehoused in circumstances where duty may be drawn back the certificate of receipt mentioned in paragraph (4) above shall—

(a) be in such form and contain such particulars as the Commissioners may require, and

20 (b) be endorsed on one of the copies of the warehousing advice note that accompanied the goods,

and in this paragraph “warehousing advice note” means a document (in such form and containing such particulars as the Commissioners may require) drawn up by the person to whom the certificate of receipt will be sent.

25 (5) Except as the proper officer otherwise allows the occupier shall give only one receipt required by paragraph (4) above for each lot or parcel of goods warehoused.

(6) In the case of spirits warehoused at the distillery where they were produced satisfaction of the requirements of regulation 21 of the Spirits Regulations 1982 shall be deemed to be compliance with the requirements of entry and account in paragraphs (1) and (2) above.

30 (7) Should the occupier fail to comply with any condition or restriction imposed by or under paragraphs (1), (2), (3) or (6) above any goods in respect of which the failure occurred shall be liable to forfeiture.

12 Securing, marking and taking stock of warehoused goods

35 (1) The occupier shall take all necessary steps to ensure that no access is had to warehoused goods other than as allowed by or under these Regulations.

(2) Goods shall be warehoused in the packages and lots in which they were first entered for warehousing.

(3) The occupier shall—

(a) legibly and uniquely mark and keep marked warehoused goods so that at any time they can be identified in the stock records; and

5 (b) stow warehoused goods so that safe and easy access may be had to each package or lot.

(4) The occupier shall, when required by the proper officer to do so, promptly produce to him any warehoused goods which have not lawfully been removed from the warehouse.

(5) The occupier shall take stock of all goods in the warehouse—

10 (a) monthly in the case of bulk goods in vats or in storage tanks; and

(b) annually in the case of all other goods,

and shall take stock at such other times and to such extent as the Commissioners may for reasonable cause require.

(6) In accordance with the Commissioner's directions the occupier shall—

15 (a) balance his stock accounts and reconcile the quantities of those balances with his Excise Warehouse Returns; and

(b) balance his stock accounts so that they can be compared with the result of any stock-taking.

20 (7) The occupier shall notify the proper officer immediately in writing of any deficiency, surplus or other discrepancy concerning stocks or records of stocks whenever or however discovered.

(8) Any goods—

(a) found not to be marked in accordance with paragraph (3) above; or

25 (b) found to be in excess of the relevant stock account and not immediately notified to the proper officer,

shall be liable to forfeiture.”

“21 Records to be kept

(1) The occupier shall, in relation to goods in an excise warehouse, keep the records prescribed by Schedule 2 to these Regulations.

30 (2) The proprietor of goods in an excise warehouse, or of goods which have been removed from an excise warehouse without payment of duty, or which are to be warehoused, may be required by the proper officer to keep the records prescribed by Schedule 3 to these Regulations in so far as they relate to his proprietorship of the goods.

(3) In addition to the other records required by this regulation the occupier shall, in relation to his occupation of the warehouse, keep such records of the receipt and use of goods received into the excise warehouse other than for warehousing therein as the proper officer requires.

- 5 (4) Records required by or under this regulation shall—
- (a) be entered up promptly;
 - (b) identify the goods to which they relate;
 - (c) in the case of an occupier be kept at the warehouse;
 - 10 (d) in the case of a proprietor be kept at his principal place of business in the United Kingdom, or at such other place as the proper officer allows; and
 - (e) be kept in such form and manner and contain such information as the Commissioners direct.”

“Schedule 2 Records to be kept by the Occupier

Records of

- 15 (a) goods deposited in the excise warehouse, from where and from whom received, and date of warehousing;
- (aa) any certificate or other document that accompanied beer that contained a statement of the amount of beer produced in the brewery where the beer was produced;
- 20 (b) goods removed from the excise warehouse, the purpose of the removal, date of removal and (if the purpose of the removal is other than for home use) the place to which the goods are removed;
- (c) stock of warehoused goods;
- (d) deficiencies and increases in stock;
- 25 (e) operations performed;
- (f) deficiencies and increases in operation;
- (g) accounts taken of goods deposited in the excise warehouse, removed from the excise warehouse, put into operation, received from operation, and of stocks in the excise warehouse;
- 30 (h) samples drawn from warehoused goods, samples removed from warehouse, and the person to whom samples are delivered;
- (i) the manner in which duty is paid or accounted for when goods chargeable with duty are removed for home use;

- (j) the manner in which security is given when goods chargeable with duty are removed for purposes other than home use, and the dates when certificates of receipt or shipment are received;
- 5 (jj) a copy of any authorisation which is required, in accordance with regulations made under section 60A of the Customs and Excise Management Act 1979, to ship goods as stores without payment of duty;
- (k) notices delivered to the proper officer and of the manner and time of delivery;
- (l) times when the excise warehouse is opened and closed;
- (m) names and titles of keyholders to the excise warehouse;
- 10 (n) the name and address of the proprietor of each lot or parcel of goods, and of changes of proprietorship.”

Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“the 2010 Regulations”)

15 “5

Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.

6

20 (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
25 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.

(2) In paragraph (1)(d) “importation” means—

- 30 (a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or
- (b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

(3) In paragraph (2)(a) “EU excise goods” means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.”

5 **11**

(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(c) (production of excise goods outside a duty suspension arrangement) is the person producing the excise goods.

10 (2) In the case of irregular production of excise goods, any other person involved in their production is jointly and severally liable to pay the duty with the person specified in paragraph (1).

15 **“12**

(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(d) (importation of excise goods that have not been produced or are not in free circulation in the EU) is the person who declares the excise goods or on whose behalf they are declared upon importation.

20 (2) In the case of an irregular importation any person involved in the importation is liable to pay the duty.

(3) Where more than one person is involved in the irregular importation, each person is jointly and severally liable to pay the duty.”

PART 4

UK REGISTERED CONSIGNORS

Approval and Registration

Law In Force

30.—

(1) For the purposes of section 100G of CEMA 1979 the Commissioners may approve revenue traders who wish to only dispatch excise goods under duty suspension arrangements upon their release for free circulation in accordance with Article 79 of Council Regulation 2913/92/EEC and register them as excise dealers and shippers in accordance with section 100G(2) of CEMA 1979.

(2) A revenue trader who has been so approved and registered shall be known as a UK registered consignor.

PART 4

UK REGISTERED CONSIGNORS

Approval and Registration

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(2) A revenue trader who has been so approved and registered shall be known as a UK registered consignor.

PART 5

HOLDING AND MOVEMENT OF EXCISE GOODS UNDER DUTY SUSPENSION ARRANGEMENTS

Holding of excise goods under duty suspension arrangements

✔ Law In Force

34.

Excise goods may be deposited and kept under duty suspension arrangements only in a tax warehouse.

Moving excise goods under duty suspension arrangements

✔ Law In Force

35.

Excise goods of a certain class or description may only be imported into or exported from the United Kingdom under duty suspension arrangements if they are—

- (a) dispatched from a tax warehouse to—
 - (i) another tax warehouse approved in relation to excise goods of that class or description;
 - (ii) a registered consignee who has been registered in relation to excise goods of that class or description;
 - (iii) a place from where they will leave the territory of the EU;
 - (iv) an exempt consignee where the goods are dispatched from the United Kingdom to another Member State or are dispatched from another Member State to the United Kingdom;
- (b) dispatched by a registered consignor in another Member State from the place of importation to any of the destinations referred to in paragraph (a); or
- (c) dispatched by a UK registered consignor from the place of importation to any of the destinations referred to in paragraph (a), other than a UK registered consignee.

5

36.

An authorised warehousekeeper or UK registered consignee whose terms of approval so allow may import excise goods under duty suspension arrangements to a place of direct delivery in the United Kingdom.

37.

Excise goods of a certain class or description may only be moved wholly within the United Kingdom under duty suspension arrangements if they are—

- (a) dispatched from a tax warehouse to—
 - (i) another tax warehouse approved in relation to excise goods of that class or description;
 - (ii) a place from where they will leave the territory of the EU; or
- (b) dispatched by a UK registered consignor from the place of importation to either of the destinations referred to in paragraph (a).

57.— Electronic administrative document for movements of excise goods under duty suspension arrangements wholly within the United Kingdom

(1) Subject to regulation 60, a movement of excise goods to which this Part applies must take place under cover of an electronic administrative document.

(2) Before the excise goods are dispatched, the consignor must complete a draft electronic administrative document that complies with the EU requirements and send it to the Commissioners using the computerised system.

(3) The Commissioners must carry out an electronic verification of the data in the draft electronic administrative document.

(4) Where the data in the document are invalid, the Commissioners must, using the computerised system, inform the consignor of that fact without delay.

(5) Where the data in the document are valid, the Commissioners must assign to the document a unique administrative reference code and, using the computerised system, inform the consignor of that code.

(6) If the excise goods are dispatched to a tax warehouse the Commissioners must, using the computerised system, send the electronic administrative document to the authorised warehousekeeper of that warehouse.

(7) The consignor of the excise goods must provide the person accompanying the goods during the course of the movement with—

- (a) a printed version of the electronic administrative document; or
- (b) any other commercial document on which the unique administrative reference code is clearly stated.

5

(8) Whilst the goods remain in the custody or under the control of the person accompanying the goods, that person must, upon request, produce or cause to be produced to the Commissioners one of the documents referred to in paragraph (7).

.....