Neutral Citation: [2025] UKFTT 29 (TC)

Case Number: TC09401

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House and Microsoft Teams]

Appeal reference: TC/2021/00470

EXCISE DUTY – assessment to excise duty as goods (counterfeit tobacco) held outside a duty suspension arrangement – no evidence that duty paid – arrangement entered into between the Appellant and others – Appellant received goods at his employer's premises and locked goods there following their delivery – whether the Appellant held, handled or had any involvement in the goods – yes – Dawson's (Wales) Ltd, Davison & Robinson, WR and Perfect considered and applied – excise duty point – no earlier duty point identified – absence of innocent agent defence or explanation – inability to pay assessment not relevant – Appeal dismissed

Heard on: 26 September & 10 December 2024
Judgment date: 9 January 2025

Before

JUDGE NATSAI MANYARARA
JOHN WOODMAN

Between

IGOR KOLOSOV

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Appellant in Person

For the Respondents: Ms Azeeza Beegun, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant (Igor Kolosov) appeals against an assessment to excise duty ('**the Assessment**"), in the sum of £1,109,311, raised pursuant to s 12(1A) of the Finance Act 1994 ("**FA 1994**"). The Assessment is dated 27 October 2020 and was raised after HMRC found evidence demonstrating that 3,602,800 counterfeit cigarettes ("**the Goods**") had been held by the Appellant on 28 October 2019.

2. HMRC concluded that the Goods had been held by the Appellant outside a duty suspension arrangement in circumstances where excise duty had not been paid, relieved, remitted or deferred. HMRC, therefore, submit that the Appellant is liable to the Assessment because he was "holding" the Goods within the meaning of reg. 6(1)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("**the Excise Duty Regulations**"), and that he was a person who had handled the Goods. HMRC further submit that the Appellant was able to control access to the Premises at which the deliveries took place.

3. The Appellant's case is that he was innocent of any wrongdoing as he believed that he was unloading vegetarian food, and not tobacco, at the time that he was observed unloading the Goods. He further states that he cannot afford to pay the amount due under the Assessment.

4. Whilst the hearing on 26 September 2024 was a face-to-face hearing, with the consent of the parties, the form of the resumed hearing on 10 December 2024 was V (video). Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

ISSUE(S)

5. The issue in this appeal is whether the Appellant is liable for the Assessment. This, in turn, requires consideration of the issue of whether the Appellant "held" excise goods (i.e., the Goods).

BURDEN AND STANDARD OF PROOF

6. HMRC have the burden of proving that they have issued a valid Assessment.

7. Pursuant to s 16(6) FA 1994, the burden of proof is on the Appellant to show that: (i) the there is no liability to excise duty. In this respect, s 154(2)(a) of the Customs and Excise Management Act 1979 ("**CEMA**") provides that where, in any proceedings relating to customs or excise, any question arises as to whether or not any duty has been paid or secured in respect of any goods, then where those proceedings are brought by or against the Commissioners, the burden of proof shall lie upon the other party to the proceedings.

8. The standard of proof is the ordinary civil standard; that of a balance of probabilities.

THE DOCUMENTS

9. The documents to which we were referred included the: (i) Documents Bundle consisting of 550 pages (within which were the Notice of Appeal and the Statement of Case dated 18 November 2022); and (ii) HMRC's Skeleton Argument dated 18 September 2024.

BACKGROUND FACTS

10. On 28 October 2019, HMRC were notified by Norfolk Police that an HGV lorry ("the lorry") had unloaded pallets of cigarettes at the premises of "Kai Timber and Fencing"; a unit at Boundary Road West, Alexander Dock, ABP Kings Lynn ("**the Premises**"). Investigators had recovered CCTV footage from the Premises.

11. For ease of reference, the individuals referred to in this appeal are:

Name	**Initials**
Daniel Danielius (driver of the Mercedes observed at the Premises)	D.D.
Abdul Latif Abdullah (driver of the Mercedes Van observed at the Premises)	A.L.A.
Gus (Steve) Auker (Appellant's employer)	G.A.
Vitanus/Vitook (Appellant's contact said to have made the arrangement)	Vitus
Edward Wojciechowski (driver of the lorry)	E.W.
Michael Turner (an employee and childhood friend of G.A.)	M.T.
Mark McCabe (another employee of G.A. working at an adjacent business)	M.M.
Anna Kuksinova (contact on the Appellant's phone)	A.K.

12. Following investigations, HMRC Officers confirmed that the lorry had entered the United Kingdom at Tilbury docks and travelled to the Premises. The Appellant - a forklift driver and an employee at the Premises - had been observed unloading several pallets from the lorry. The two other vehicles observed at the Premises have been identified as a Mercedes, belonging to D.D. and a Mercedes Van belonging to A.L.A. The police had cut through padlocks at the Premises and identified 19 pallets containing clear wrapped boxes labelled "Richmond King-size cigarettes". A tally of the contents identified a total of 3,602,800 cigarettes. The consignment was, however, described as "frozen foods". The employer at the Premises, G.A., was said to have been unaware of the arrangement for the delivery and unloading of the Goods at the Premises.

13. On the same date (28 October 2019), the Appellant was interviewed and arrested on suspicion of the fraudulent evasion of excise goods, contrary to s 170 CEMA. HMRC Officers Richard Peacock and Alison Chaplin conducted the interview. The Appellant explained that he had accepted payment of £50 from Vitus to assist in unloading the Goods, having agreed to use the Premises to do so. The Appellant stated that he was contacted by Vitus, who had arrived at his home address at 6pm on 27 October 2019 and had asked him to help him to unload a trailer that would arrive at the Premises. He added that he has known Vitus for seven to eight years and used to work with him at a chocolate factory. The Appellant's position was that he had agreed to use the Premises because he had a forklift there. The Appellant also stated that he asked Vitus if the load was illegal, and Vitus had said that it was not. The Appellant claims he was told by Vitus that the load contained vegetarian food.

14. Analysis of the Appellant's mobile phone showed photos of tobacco sent to him on 8 September 2018 from a number registered to A.K., with an address in Dover. Investigators also identified a contact on the Appellant's phone called "Vitus", as well as communications with D.D.

15. On 8 November 2019, E.W., the driver of the lorry, was detained and interviewed. He stated that he had collected the Goods in Czaplinek, Poland, where the trailer was loaded. He subsequently delivered the Goods to the Premises on 28 October 2019.

16. On 12 November 2019, G.A. gave a voluntary interview. He stated that he did not attend the Premises on the morning of 28 October 2019 as he was at a speed awareness course. He further stated that M.T. had telephoned him on the morning of 28 October to tell him that there was a refrigerated HGV lorry at the unit in the Premises. G.A. confirmed that he knew nothing about the delivery and stated that it should not have been there. He further stated that he knew nothing about the Goods, or that the Appellant was planning to take the delivery. G.A. arrived

at the Premises at approximately 13.45hrs, after the police had arrived. M.T. and M.M., who were working at "Gus Auker Pipe Installations" (the unit adjacent to the Premises) on the morning of the 28 October 2019, also gave witness evidence.

17. On 3 June 2020, the Goods were confirmed as being counterfeit. HMRC have since seized the Goods.

18. On 27 October 2020, Officer Alexander Collingwood (of HMRC) issued the Assessment to the Appellant.

19. On 11 February 2021, the Appellant filed a Notice of Appeal against the Assessment. The appeal was stayed pending criminal investigations.

20. On 26 May 2021, the Appellant was interviewed by HMRC Officers Lucy Craig and Chris Price, for the purposes of the criminal investigation. When asked if he wanted to add anything to his original account, the Appellant replied "*nothing changed*".

21. On 18 June 2021, HMRC confirmed that hardship had been granted.

22. On 23 December 2021, the Appellant filed and served a letter protesting his innocence in any wrongdoing.

23. In 2022, the Crown Prosecution Service ('CPS') confirmed to HMRC that no charges would be brought against the Appellant for the fraudulent evasion of excise duty.

24. On 16 October 2023, the Appellant filed and served a letter/witness statement repeating the statements made in his letter dated 23 December 2021.

Joint and several liability

25. On 5 May 2021, D.D. was interviewed under caution. During his interview, he stated that a person called Piotr/Peter had approached him at the gym and asked if could move a load, urgently, for payment of £500. He added that he believed that the load contained onions. After receiving the Goods at the Premises, D.D said that he and A.L.A. followed Peter to a warehouse in Peterborough.

26. On 5 May 2021, A.L.A stated that D.D. was a known associate of his, and that he had helped him move furniture in the past. He added that D.D. had called him and asked him for four runs with his van from Kings Lynn to Peterborough and back, for a total of £1,000.

27. On 13 September 2021, HMRC issued a notice of liability to D.D. and A.L.A., on a joint and several-basis. These decisions have not been appealed by either individual.

RELEVANT LAW

28. The relevant law, so far as is material to the issues in this appeal, is as follows:

29. Section 1(1)(a) and 2(1) of the Tobacco Products Duty Act 1979 provide that excise duty shall be charged on tobacco products imported into, or manufactured in, the United Kingdom.

30. Section 170(1)(b) CEMA makes it a criminal offence to knowingly be concerned in carrying, removing, depositing, harbouring, keeping or concealing, or in any manner dealing with any goods which are chargeable with a duty which has not been paid, with intent to defraud HMRC of any duty payable on the goods.

The Excise Duty Directive

31. Council Directive 2008/118 EC ("**the Excise Duty Directive**") laid down general arrangements for the harmonisation of excise duty across the EU. Article 1(c) of the Excise Duty Directive provides that:

Article 1

1.This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter 'excise goods'):

…

(c) manufactured tobacco covered by Directives 95/59/EC, 92/79/EEC and 92/80/EEC."

32. Article 4 provides that:

Article 4

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

…

7.'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; …"

33. Chapter II "Chargeability, reimbursement, exemption", Section 1, deals with the "Time and place of chargeability".

34. Article 7 provides the definition of "**release for consumption**":

Article 7

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

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

…

(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; …"

35. Article 8 then provides that:

Article 8

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

…

(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;

…

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

36. Section 2 provides, so far as relevant, as follows:

"Section 2

Holding in another Member State

Article 33 (Excise goods already released for consumption in one Member State)

1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34."

37. Section 1 of the Finance (No. 2) Act 1992 contains the authority for making regulations to implement the provisions of the Excise Duty Directive concerning the chargeability of goods to excise duty in the United Kingdom, and persons liable to pay such duty.

38. The Excise Duty Regulations implement the provisions of the Excise Duty Directive.

The Excise Duty Regulations

39. Regulation 5 of the Excise Duty Regulations provides that there is an excise "**duty point**" at the time when excise goods are "**released for consumption**" in the United Kingdom.

40. Regulation 6 deals with excise duty points, as follows:

"**6.**—(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 ... excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
(c) are produced outside a duty suspension arrangement; or
(d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement."

41. Therefore, four excise duty points are prescribed by reg. 6 (which deals goods being held outside a "**duty suspension arrangement**").

42. Regulation 10(1) identifies the person liable to pay the duty when excise goods are released for consumption as the person "**holding**" excise goods at that time:

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

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

43. Regulation 13 provides that:

"**13**.-(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the UK in order to be delivered or used in the UK, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person –

(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered."

44. What Reg.13(1) seeks to identify is the first excise duty point in the United Kingdom and it therefore looks to the first time at which the goods are held for a commercial purpose in the United Kingdom.

45. Regulation 88 of the Excise Duty Regulations deals with forfeiture, and provides that:

> "If in relation to any excise goods that are liable to duty that has not been paid there is—
>
> (a) a contravention of any provision of these Regulations, or (b) a contravention of any condition or restriction imposed by or under these Regulations, those goods shall be liable to forfeiture."

46. Regulation 20(1) of the Excise Duty Regulations has the effect that duty must be paid at or before an excise duty point.

CEMA

47. Section 139 CEMA provides that:

> "**139. Provisions as to detention, seizure and condemnation of goods, etc.**
>
> (1) Anything liable to forfeiture under the customs and excise Acts may be seized, or detained, by any officer or constable or any member of HM Armed Forces, or coastguard.
>
> …
>
> (5) Subject to subsections (3) and (4) above and to Schedules 2A and 3 to this Act, any thing seized or detained under the customs and excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.
>
> (6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts."

48. Paragraph 5 of Schedule 5 CEMA provides that:

> "**5.** If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

49. Section 154(2)(a) CEMA provides that:

> "(2) Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not—
>
> (a) any duty has been paid or secured in respect of any goods; ...
>
> then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the customs and excise Acts, the burden of proof shall lie upon the other party to the proceedings."

The Assessment

50. HMRC are empowered to raise an excise assessment under s 12(1A) FA 1994, which provides that:

> "where it appears to the Commissioners that any person is a person whom any amount has become due in respect of any duty of excise...the Commissioners may assess the amount of duty due from that person."

51. Section 12(1A) and 12(4) FA 1994 provide that:

"**12 Assessments to excise duty**

(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) that the amount 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.

...

(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

(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"

52. Sections 13A(2)(b) and 16(1B) FA 1994 provide for an appeal to the First-tier Tribunal ('FtT') against a decision of HMRC to raise an assessment to excise duty under s 12(1A).

53. Section 13A FA 1994 sets out the meaning of "**relevant decision**" and s 16 deals with appeals to a tribunal:

"**13A Meaning of "relevant decision**"

(1) This section applies for the purposes of the following provisions of this Chapter.

(2) A reference to a relevant decision is a reference to any of the following decisions—

…

(b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above."

54. In relation to appeals to the FtT, s 16 FA 1994 provides that:

"**16 Appeals to a tribunal**

…

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—

…

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

55. Section 16(5) FA 1994 provides that the power of the FtT in an appeal such as the appeal before us includes the power to either quash, or vary, or substitute its own decision for any decision quashed on appeal. The FtT has no jurisdiction under s 16(5) to consider a Wednesbury unreasonableness challenge to an assessment issued on the basis that an excise duty point was triggered.

APPEAL HEARING

56. The hearing was adjourned, part-heard, on 26 September 2024, when the Appellant indicated that he wished to speak to a legal representative at the conclusion of HMRC's

evidence and submissions. At the resumed hearing on 10 December 2024, the Appellant stated that he had not been able to afford legal representation and confirmed that he was happy to proceed with the hearing. Whilst he did not have the documents with him during the resumed hearing, he had confirmed that he had received all of the documents at the part-heard hearing on 26 September 2024. The Appellant was assisted by a Polish interpreter, whom he confirmed he understood, throughout the proceedings.

Preliminary discussions

57. At the commencement of the appeal hearing, Ms Beegun submitted that the Appellant was liable to the Assessment because he was holding the Goods at the first duty point identified by HMRC. She added that the Assessment was not a "best judgment" assessment, and that no penalty had been applied.

Respondent's evidence and submissions

58. We heard oral evidence from Officer Collingwood, who is an officer of HMRC in the Excise Post Detection Audit ('PDA') Team. He has worked as a compliance caseworker for the PDA Team since October 2017.

59. Officer Collingwood stated that when receiving the Appellant's case, he reviewed the information provided by the Fraud Investigation Service ('FIS'). This included the interview transcripts of the Appellant, G.A., E.W., M.M. and M.T., as well as the witness statements of Officers Evitt, Craig, Nichols, Pentelow, Kay, Readle and the notebooks of Officers Chaplin, Christmas, Colwell, Peachy, Whiting, Baker, Cook, Readle, Pentelow and Kaur. He also considered the tally records, CCTV stills, photos of the Goods and the Appellant's phone records. On 27 October 2020, he issued the Assessment to the Appellant. He states that the Appellant did not provide HMRC with any information to help identify Vitus, whom the Appellant had claimed was involved with the delivery arrangements, and did not provide details to identify D.D. or A.L.A.

60. In response to questions in examination-in-chief from Ms Beegun, Officer Collingwood said that he did not view the CCTV footage from the investigations himself but considered the information provided by the FIS, as well as what was mentioned in the interview transcripts. He added that he issued the Assessment after he had reviewed the evidence from the FIS, which showed that the Appellant had arranged for the Goods to be delivered to the Premises. He concluded by saying that he was satisfied that the Appellant was in control of the Goods at the time, and that the Appellant had physical possession of the Goods when they were seized.

61. Under cross-examination from the Appellant, he said this:

(1) The fact that the Appellant did not own the unit at the Premises is irrelevant. The fact that the Goods may not have belonged to the Appellant is also irrelevant. The issue is whether the Appellant can be considered to have been in control of the Goods, having organised for their delivery to the Premises.

(2) He considered that the Appellant had stated in his interview that he was contacted by Vitus, and that he was going to receive payment for unloading the Goods. He had also considered that the Appellant had said that he arranged for the Goods to be delivered to the Premises because he had a forklift truck.

(3) The Appellant had met the lorry driver at the docks and directed him to the Premises. He proceeded to unload the lorry and locked the unit at the Premises behind him.

62. In response to an allegation from the Appellant that he (Officer Collingwood) had been lying about there being a unit at the Premises, Officer Collingwood confirmed that he had not seen the Premises himself.

63. In response to questions from the panel, for the purposes of clarification, Officer Collingwood stated that as the Appellant was in control of the Goods, he was deemed to be in possession of the Goods. He added that this was despite the fact that the Appellant may not have been physically holding the Goods. He clarified that the Goods came into the Appellant's control when he directed the lorry to the Premises and began to unload the Goods. As the Appellant had locked the Goods in a unit at the Premises, he was in control of the Goods. He further added that the police had to cut through the locks to gain access to the Goods. His position was, however, that whether the unit was locked or not would have made no difference to the liability that has arisen.

64. Officer Collingwood added that A.L.A and D.D. had also been assessed as they were present when the Goods were unloaded at the Premises. His position was that the strongest evidence was in respect of the Appellant as the Appellant had arranged for the Goods to be delivered at the Premises.

65. In re-examination, Officer Collingwood repeated that A.L.A. and D.D. had been found jointly and severally liable.

66. Mr Beegun's submissions can be summarised as follows:

(1) The Appellant is liable to the Assessment pursuant to reg. 10(1) of the Excise Duty Regulations because he held the Goods within the meaning of reg. 6(1)(b). Strict liability is conferred on those persons holding goods on which excise duty has not been paid and HMRC are not required to establish whether such persons had actual, or constructive, knowledge of the goods being excise goods with unpaid duty. Where there is a strict liability for duty on a person found holding the goods, HMRC are obliged to assess. Case law has determined how to determine whether a person held goods.

(2) The Appellant has not discharged the burden upon him to prove an identifiable excise duty point that may have occurred at an earlier point in time, or other persons who may have had greater *de facto*/legal control over the Goods. On the evidence available, the Appellant had *de facto* control over the Goods at the time the excise duty point arose. The Appellant exercised a greater degree of control over the collection and movement of the Goods than the lorry driver. The lorry driver had, according to the evidence available, made the delivery on the direction of the Appellant and his associates. The lorry driver returned to the Premises on the Appellant's instructions.

(3) The Tribunal has no jurisdiction to consider the adequacy of HMRC's investigations to establish an earlier duty point and any challenge on that basis would be a matter for judicial review.

(4) It is immaterial whether the Appellant had any right or interest in the Goods, or whether he was or should have been aware that they were subject to or had become chargeable to excise duty. There is no "innocent agent" exception in relation to "holding" for the purposes of liability to excise duty. The Appellant has not been able to establish an earlier duty point. The only possible defence that the Appellant may have had was to identify and establish an earlier duty point. For example, that the lorry driver or others had control over the Goods.

(5) The lack of means for Appellant to pay the duty due is not a ground of appeal that can be considered by the Tribunal.

Appellant's evidence and submissions

67. We heard oral evidence from the Appellant. The Appellant adopted the contents of his Notice of Appeal, and the statement/emails, dated 21 December 2021 and 16 October 2023, as being true and accurate. In his written evidence, the Appellant said this:

(1) He has not been presented with any proof of his guilt.

(2) He has never denied that he was at the Premises on 28 October 2019.

(3) He was happy to receive the opportunity to earn money for honest labour. He would have called the police if he knew that the Goods were contraband. He believed that he was unloading vegetarian food.

(4) He has been working at the port for two years and is a person of good standing.

(5) He has a large family and his wife does not work.

68. In his oral evidence, the Appellant stated that he has given his full account to the authorities and he has explained how he came to unload the Goods. He added that he has co-operated with the authorities, and that he is not sure what else he can do. He further added that his background in the United Kingdom can be checked to show that he is of good standing. He concluded by saying that people who engage in criminal activity do so on a regular basis.

69. Under cross-examination from Ms Beegun, the Appellant accepted the following:

(1) He agreed to earn £50 to unload the Goods because he had a forklift truck.

(2) He used the forklift truck to unload the Goods at the Premises.

(3) He locked the Goods in a unit or garage at the Premises (albeit that his position is that his colleagues would have had access to the keys for the locks).

(4) He loaded some of the Goods onto a Mercedes van thereafter.

(5) A.L.A was driving one of the vehicles at the Premises. He cannot recall seeing D.D., but possibly D.D. was also present (albeit that his position was that he is unclear if D.D. was with A.L.A. and he was of the view that D.D. may have been trying to protect Vitus).

(6) He did not inform his employers about the arrangement to accept delivery of the Goods at the Premises (albeit hat his position was that his intention was to finish the job before the working day started).

(7) He did not check any paperwork with the lorry driver before he took delivery of the Goods.

(8) He directed the lorry driver to return to the Premises with the remainder of the Goods.

(9) He did not believe that the lorry driver was involved in the arrangement over and above delivering the Goods.

70. In response to further questions for the purposes of clarification from the panel, the Appellant explained that Vitus had been present at the first point where he (the Appellant) met the lorry, but Vitus had been in another vehicle. He added that Vitus only spent a short amount of time at the dock. He further added that he (the Appellant) had given a lift to some of the other people who were present at the dock. He further stated that there was no particular reason why he had not informed his employers about the arrangement to accept delivery of the Goods. He concluded by saying that he and Vitus had discussed deliveries of this kind being made on

a monthly basis, and that Vitus had told him that the deliveries were going to different stores but he did not enquire about why those stores could not take delivery themselves.

71. The Appellant's submissions can be summarised as follows:

(1) The Goods did not belong to him and he is innocent of any wrongdoing.

(2) He does not earn enough money to pay the duty owed.

(3) He gave all of the information that he had to the police and he was released without charge.

72. Following completion of the appeal hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

73. We have derived considerable benefit from hearing the oral evidence and the submissions, as well as from considering the written evidence. The following material facts were either accepted, admitted or proved:

(1) The Appellant was in physical possession of the Goods at some point prior to the seizure.

(2) By his own admission, the Appellant made an arrangement to accept delivery of the Goods and use his forklift to unload the Goods from the lorry at the Premises, without his employer's knowledge.

(3) The Appellant directed the lorry to the Premises.

(4) The Appellant unloaded part of the Goods onto a vehicle that belonged to an associate of his and stored the remaining Goods in a unit at the Premises. He further secured the unit with padlocks using keys.

74. A number of witness statements were relied on by HMRC and the Appellant has not challenged the information included in the witness statements:

75. Officer Prisha Patel prepared a witness statement, dated 3 January 2020. She has been employed as an Anti-illicit Trade Product Intelligence Analyst since 21 October 2013 and has been employed as a forensics manager by Imperial Tobacco Limited since 1 October 2017. On 12 December 2019, she received a sample of the Goods and was asked to examine the sample. From her analysis, she concluded that the Goods were counterfeit.

76. PC Olivia Evitt has also prepared a witness statement, dated 28 October 2019. She was on duty on 28 October 2019 and arrived at the Premises at 10.30hrs. She had received information that pallets had been delivered to the wood workshop on Premises, and that the pallets were suspected of containing counterfeit goods. She added that the information received was that the Appellant had taken delivery of the Goods. She arrested the Appellant at 11.31hrs.

77. PC Caroline Nichols has also prepared a witness statement, dated 28 October 2019. She was on duty, in plain clothes, at King's Lynn Police Station. She states that at 11.25hrs, she met other police officers at the Premises. At 15.15hrs, she received information that G.A. was at the unit. She informed G.A. that he was under arrest, and seized his telephone. She then arranged for him to be interviewed by HMRC.

78. Officer Lucy Craig has prepared a witness statement, dated 11 February 2020. Officer Craig is an Officer of HMRC working within the FIS. On 12 November 2019, between 10.37hrs and 11.39hrs, she and Officer Ben Colwell conducted a digitally recorded Voluntary Attender Interview under caution with G.A. at Kings Lynn Police Investigation Centre.

79. Office Louis Pentelow has prepared a witness statement, dated 21 April 2020. Officer Pentelow is an Officer of HMRC, currently working within the FIS. On 8 November 2019, between16.53hrs and 18.47hrs, he and Officer Mark Bagley conducted a digitally recorded interview under caution with E.W., at Greys Police station, Essex. On 28 November 2019, he was on duty at a Border Force storage facility. He was present for the tally of the Goods that were seized. He was assisted by Officers Kaur, Colwell, Whiting, Christmas and Jackson. He states that there were 19 pallets that were required to be tallied in total. 18 of them held a stack of 60 individual boxes. One held a stack of 46 boxes. In total, there were 1126 boxes to open and tally.

80. At 10.33hrs, he opened and examined the first box. The box contained 3,200 Richmond cigarettes. All other boxes examined, except for two, contained 3200 cigarettes apiece. Those two boxes only contained 3,000 cigarettes apiece. The tally was completed at 12.50hrs. In total, across the 19 pallets, with 3,200 cigarettes in 1,124 boxes and 3000 in 2 boxes, he confirms that there were 3,602,800 cigarettes. He adds that the duty rate applied on cigarettes for the year 2019-20 is £375 per 1,000 cigarettes. Therefore, the cigarettes contained in the pallets would represent a total loss to the revenue of approximately £1,351,050.

81. Officer Readle has prepared witness statements, dated 12 and 13 December 2019. On 28 October 2019, she was on duty at Kings Lynn Police Investigation Centre with other HMRC officers. At 16.02hrs, she arrested the Appellant on suspicion of the fraudulent evasion of excise goods.

82. We have also seen the notebooks of Officers, Chaplin, Christmas, Colwell, Kaur, Peachey, Whiting, Pentelow, Cook and Readle. These set out the events on the day of the seizure, as set out in the background facts.

83. The following witness statements were also submitted in support of the appeal:

84. In his witness statement dated 26 November 2019, M.T., stated that he had arrived at his work premises at approximately 7.50hrs, on 28 October 2019. As he parked his car, he saw a forklift truck being used to unload a white refrigeration lorry. He observed that some pallets were taken off and left in front of the units and others were taken into the Premises. M.T. recognised the person using the forklift as the Appellant. M.T. had known the Appellant for two to three years by then. M.T. also witnessed the lorry driver and four other white males, all with Eastern European accents and all of whom he did not recognise. M.T asked the Appellant how long he would be as he also needed to use the forklift. He then telephoned G.A. to ask whether he knew what was happening and G.A. confirmed that he knew nothing about the delivery, or why the lorry was there. M.T. observed that once the pallets had been left at the Premises, the Appellant locked the doors to the unit with two padlocks. He then saw the lorry leave and four men left in a black SUV vehicle. M.T. then took the forklift and carried on with his work.

85. At approximately 10.00hrs, M.T. returned to the unit and observed that a large white van was backed up to the doors of the Premises. He observed the Appellant unloading boxes into the large white van. He also saw that the SUV with the four Eastern European looking men had returned with the white van. At 11.00hrs, M.T. saw the police car heading towards the unit. M.T then went back to the Premises and observed that the doors had been locked in a way that was not usual, and that one of the padlocks did not belong to Kai Timber, or Gus Piper Installations. M.T. did not see the Appellant at that time. A police officer then asked him whether he had the keys to the padlocks and he confirmed that he did not. The police officer asked for his consent to enter the unit, and he consented as he is in charge when G.A. is absent. M.T saw the police officers cut the locks with a bolt cutter. When they entered the unit, M.T. saw pallets which had cardboard boxes on them.

86. On 26 November 2019, M.M. also provided witness evidence. He confirmed that he arrived for work at approximately 7.50hrs on the 28 October 2019. Upon arrival, he stated that he saw a big arctic white lorry, and that the Appellant and three to four others were unloading from it. He stated that someone had said the loads were filled with onion powder. M.T. told him that something funny was going on and so he rang G.A. and told him that the Appellant was unloading from an arctic white lorry into the Premises. At approximately 8.10hrs, he received a call from G.A., who told him to tell the Appellant to go to work on the docks. After doing so, the Appellant replied that he would be another 15 minutes. M.M. confirmed, that there were several people around at this time (three to four people who were foreign, white males). At 8.20hrs, he observed that the Appellant had gone to work. At approximately 10.00hrs, M.M. saw a large white van arrive. The van was backed up to the unit.

87. As stated earlier, the Appellant has not challenged the accounts given in these statements. Having considered the witness statements in their entirety, and having regard to all of the surrounding facts and circumstances in this appeal, we are satisfied that we can place reliance on the witness statements.

88. We, therefore, make these findings of fact.

DISCUSSION

89. The Appellant appeals against an Assessment to excise duty, in the sum of £1,109,311. The Appellant's case is that he was innocent of any wrongdoing as he believed that he was unloading vegetarian food, and not tobacco, at the time that he was observed unloading the Goods. He further states that he cannot afford to pay the amount due under the Assessment.

90. HMRC submit that the Appellant is liable to the Assessment because he was "holding" the Goods within the meaning of reg. 6(1)(b) of the Excise Duty Regulations, and that he was a person who had handled the Goods. HMRC further submit that the Appellant was able to control access to the Premises at which the deliveries took place.

91. "Excise duty" is an indirect tax charged on specific goods deemed to be harmful to public health, and is chargeable in addition to customs duty. Excise duty applies *inter alia*, to alcohol, tobacco products, gambling activities and hydrocarbon fuels (consumption tax). Excise duty is charged when goods subject to excise duty are produced and imported, unless duty suspension arrangements apply to them. The duty falls at the time when goods leave any "duty suspension arrangement". Excise goods subject to duty must, generally, be held in a tax warehouse operated by an authorised warehouse keeper. If duty suspension arrangements do not apply, then chargeability to excise duty is deferred until the goods depart from a duty suspension arrangement.

92. The identity of the person liable to pay the duty depends on the circumstances in which chargeability arises. The person liable to pay the duty is the person "holding" the excise goods at the time. The Assessment in this appeal was raised under s 12(1A) FA 1994. The discretion to assess conferred upon HMRC under s 12(1A) is limited. The boundaries of the discretion found in s 12(1A) are those contained in s 12(4). There are no words to be found in the legislation which confer a general supervisory jurisdiction over the HMRC's exercise of discretion: *C & E Comrs v J H Corbitt (Numismatists) Ltd* [1981] AC 22, at 60H-61A (Lord Lane). Section 154(2)(a) CEMA provides that where in any proceedings relating to customs or excise any question arises as to whether or not any duty has been paid or secured in respect of any goods, then, where those proceedings are brought by or against HMRC, the burden of proof shall lie upon the other party to the proceedings.

93. The FtT has power to review decisions of HMRC in a number of administrative areas which are specified in Schedule 5, FA 1994. These decisions are referred to, collectively, as

"ancillary matters". Section 16(4) FA 1994 confers a limited jurisdiction on the FtT to examine the reasonableness of ancillary decisions, but with very limited powers to give effect to such findings. It would not allow the FtT, or the Upper Tribunal ('UT'), to quash the decision appealed against: *CC&C Ltd. v R & C Comrs* [2015] 1 WLR 4043 ('*CC&C Ltd*'), at [16]. Assessments to duty are not ancillary decisions. As the Court of Appeal in *CC&C Ltd*, observed, at [15] to [16], (per Underhill LJ with whom Lewison and Arden LJJ agreed), s 16(4) deals with management decisions involving some element of subjective assessment.

94. The jurisdiction invoked by the Appellant's appeal to the FtT was under s 16(5), and not that under s16(4). In this respect, the FtT has a full appellate jurisdiction: *Butlers Ship Stores v HMRC* [2018] UKUT 58 (TCC) ('*Butlers Ship*'), at [150].

Whether the Appellant is liable to the Assessment (whether he was holding the Goods)

95. There is no definition of "holding" in the Excise Duty Directive or the Excise Duty Regulations. As Parker J observed in *Taylor v Wood* [2013] EWCA Crim 1151, at [29]:

> "'Holding' is not defined in the Finance Act or in the Regulations, there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods."

96. The term and the Excise Duty Regulations, generally, must be interpreted in the context of the Excise Duty Directive and its objectives. A contextual interpretation which takes into account the purpose of the legislation is necessary. The Court of Appeal in *Taylor v Wood* also said this:

> "29. …Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, Goode on Commercial Law, Fourth Edition, p 46. In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.
>
> 30. In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods, as explained above. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a "holding" of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier. Wood was correctly shown on Yeardley's invoice to be Yeardley's client and the consignee of the goods that were being transported. Under the Convention, as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants."

97. Physical possession of goods is not, therefore, required for a person to be holding those goods. Although the law has moved on as regards innocent agents, in deciding whether the

Appellant was holding the Goods, the issue for us to decide is whether the Appellant was the person who was exercising control over the Goods at the duty point.

98. The question of whether a person can be said to be "holding" goods has been the subject of much consideration and adjudication, which we have considered. The sphere of litigation that has most recently arisen began with *B & M Retail Ltd v HMRC* [2016] UKUT 429 (TCC) ('*B & M Retail*').

B & M Retail

99. In *B & M Retail*, the UT decided that a person holding excise duty goods in respect of which duty had not been paid could be assessed under reg. 6(1)(b) of the Excise Duty Regulations. This was notwithstanding the fact that, in principle, an earlier release for consumption had occurred. Such a scenario did not preclude HMRC assessing a person holding excise duty goods in respect of which excise duty had not been paid. The decision as to which of the various persons that had held the goods should be subject to excise duty assessment was found to be at the discretion of HMRC.

100. Following the decision in *B & M Retail*, the UT handed down the decision in *Davison & Robinson Ltd v R & C Comrs* [2018] UKUT 437 (TCC) ('*Davison & Robinson*').

Davison & Robinson

101. The case presented on behalf of the appellant in *Davison & Robinson* was that *B & M Retail* was wrongly decided. Further, and alternatively, the appellant argued that the issue of whether there could be more than one excise duty point should be referred to the Court of Justice of the European Union ('CJEU'). The UT held that:

> "67. We have already dealt with the first of these propositions. As regards the second proposition, the need to ensure that unpaid excise duty is collected when goods have been released for consumption requires HMRC, as the Upper Tribunal found in B&M, to make an assessment once it has established that an excise duty point has occurred. Clearly, HMRC cannot make an assessment until it has the necessary information on which to establish when, how, where and by whose acts the excise duty point occurred. Therefore, in the absence of any relevant information in relation to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, since that is the only excise duty point which HMRC is able to establish."

102. The UT ruled that HMRC has no discretion as to who to assess where there have been multiple holders of the goods and excise duty had not been paid. All that HMRC are required to do is to assess the person they find to be holding the goods in question, if that is the only excise duty point which can be established.

103. The UT observed that HMRC cannot make an assessment until they have the necessary information on which to establish when, how, where and by whose acts the excise duty point occurred. The correct position is that if there was someone who HMRC had sufficient information to assess, then HMRC *had to* assess that person irrespective of the prospects of recovery. The question of whether HMRC should pursue a person liable at an earlier duty point was not one of discretion.

104. The UT ultimately endorsed HMRC's acceptance that they were obliged to assess, as a matter of law and not merely discretion, against "the earliest point in time at which they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement" (at [79]). That was consistent with the UT's analysis that the Excise Duty Directive required an assessment to be made against the first established excise duty point.

105. If HMRC assessed anyone other than the first holder they could identify, it would be open to that person to challenge the assessment on appeal to the FtT ([80]).

106. The next relevant case was that of *HMRC v Perfect* [2019] EWCA Civ 465.

Perfect

107. Mr Perfect was stopped by UK Border Force at Dover Docks whilst driving a lorry containing pallets of beer, in respect of which excise duty had not been paid. Mr Perfect knew that he was carrying beer, but did not know (i) who owned the lorry; (ii) that duty had not been paid; and (iii) that the documentation which accompanied the load related to a previous consignment. The lorry and the goods were seized. Although HMRC accepted that the evidence did not show that Mr Perfect was actively involved in the attempts to smuggle goods into the United Kingdom, or that he deliberately attempted to evade excise duty, he was assessed for excise duty on the basis that he was holding the goods.

108. Both the FtT and the UT had found that Mr Perfect could not be held liable for the unpaid excise duty on the goods. On appeal to the Court of Appeal, the court accepted that where the driver is the only identifiable person who can be assessed, the opportunity for smuggling and fraud would be manifestly greater if the courts and tribunals conclude that he cannot be assessed if he was unaware that the goods were liable to duty. The court further held that the natural meaning of the words "holding" or "making delivery" do not impute any requirement for the person to be aware of the tax status of the goods. At [22] (Newey LJ with whom Baker and Snowden LJJ agreed), the court found that "knowledge" or "means of knowledge" is irrelevant to liability. The court, therefore, approved the conclusions of the UT, in *Davison & Robinson.* The court further commented that the EU principles of proportionality and fairness did not exclude the imposition of strict liability.

109. The Court of Appeal in *Perfect* concluded thus:

> "23. It follows that the fact that Mr Perfect had neither actual nor constructive knowledge of the smuggling of the beer he was carrying cannot exempt him from liability from excise duty."

110. The case was referred to the CJEU, given the fundamental importance of proportionality in EU law. The Court of Appeal noted in *Perfect,* at [66] to [67], (and repeated at [10] of the Court of Appeal's further judgment in the case following a CJEU reference (*R & C Comrs v WR* Case C-279/19 ('*WR*'): at [2022] 1 WLR 3180), that:

> "66. We agree that the underlying policy of the 2008 Directive is, as identified by the Upper Tribunal in B & M, that it is the obligation of every member state to ensure that duty is paid on goods that are found to have been released for consumption. It would be a distortion of the internal market were member states not to take steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the single market alongside goods on which duty has been paid. ...
>
> 67. This policy is, to our eyes, reflected in the terms of the Directive and the Regulations. ... Although fairness and proportionality are, of course, cornerstones of EU law, as they are of the common law, they do not invariably exclude the imposition of strict liability. We consider that there is very considerable force in the argument that, given the policy underlying the Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality."

111. Mr Perfect could not provide any other details of who owned the goods. That is, ultimately, why he was found liable.

112. The principle of ensuring the collection of tax was recognised by Baker LJ in the Court of Appeal when it first considered *Perfect* in 2019, and again by Newey LJ when it subsequently applied the CJEU determination of the question.

WR

113. In *WR*, it was argued that commercial chaos would follow if a delivery driver, who, while they knew or ought to have known the goods were excise goods did not know they were duty unpaid, was still found liable. Rejecting the concern, the Advocate General considered that the undertaking rather than the driver would be liable, contrasting the employed status of the delivery driver in the example with the taxpayer's status as a self-employed entrepreneur.

114. The CJEU held, at [24] to [25], that:

> "24. The concept of a person who 'holds' goods refers, in everyday language, to a person who is in physical possession of those goods. In that regard, the question whether the person concerned has a right to or any interest in the goods which that person holds is irrelevant.
>
> 25. Moreover, there is nothing in the wording of Article 33(3) of Directive 2008/118 to indicate that the status of person liable to pay the excise duty, as being 'the person holding the goods intended for delivery', depends on ascertaining whether that person is aware or should reasonably have been aware that the excise duty is chargeable under that provision."

115. And at [27] to [31]:

> "27. …the person liable to pay the excise duty is, in accordance with Article 8(1)(b) of that directive, 'the person holding [those] ... goods and any other person involved in the holding of the excise goods'.
>
> 28. However, like Article 33(3) of Directive 2008/118, Article 8(1)(b) of that directive does not contain any express definition of the concept of 'holding' and does not require the person concerned to be the holder of a right or to have any interest in relation to the goods which that person holds, or that that person be aware or that he should reasonably have been aware that the excise duty is chargeable under that provision.
>
> 29. By contrast, in a situation different from that referred to in Article 33(3) of Directive 2008/118, that is to say, in the case of an irregularity during a movement of excise goods under a duty suspension arrangement, within the meaning of Article 4(7) of that directive, Article 8(1)(a)(ii) of that directive provides for liability to pay the excise duty on the part of any person who participated in the irregular departure of those goods from the duty suspension arrangement and who, furthermore, 'was aware or who should reasonably have been aware of the irregular nature of the departure'. The EU legislature did not restate this second condition, which can be regarded as requiring an element of intention, either in Article 33(3) or, moreover, in Article 8(1)(b) of that directive (see, by analogy, judgment of 17 October 2019, Comida paralela 12, C-579/18, EU:C:2019:875, paragraph 39).
>
> 30. It follows that, where, in Directive 2008/118, the EU legislature intended that an intentional element be taken into account for the purpose of determining the person liable to pay the excise duty, it has laid down an express provision to that effect in that directive.
>
> 31. Furthermore, an interpretation limiting the status of person liable to pay the excise duty as being 'the person ... holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, to those persons who are aware or should reasonably have been aware that excise duty has become chargeable would not be consistent with the objectives pursued by Directive 2008/118, which include the prevention of possible tax evasion, avoidance and abuse (see, to that effect, judgment of 29 June 2017, Commission v Portugal, C-126/15, EU:C:2017:504, paragraph 59)."

[Emphasis added]

116. The CJEU summarised this as reflecting the intention of the EU Legislature to lay down a broad definition of the persons liable to pay excise duty on goods released for consumption in order to ensure that so far as possible that the duty is collected (at [33]).

117. And, at [34], the CJEU said this:

> "34. However, to impose an additional condition requiring that the 'person ... holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty."

118. Therefore, a person may be said to be "holding" goods for the purposes of reg. 10(1) of the Excise Duty Regulations if they are in "physical possession" of the goods. It is irrelevant whether that person has any right or an interest in the goods. It is also irrelevant whether or not that person is or should be aware that the goods are subject to or have become chargeable to excise duty.

119. The CJEU concluded, at [36], that:

> "...a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty."

120. While that passage was about art. 33 of the Excise Duty Directive - implemented in the Excise Duty Regulations by reg. 13 - the Court of Appeal in *Dawson's* had confirmed the meaning of "holding" had the same meaning through the directive and this therefore applied to reg. 6(1)(b).) This determination was acknowledged subsequently by Newey LJ in the Court of Appeal decision in *Perfect*, at [22], in which the CJEU interpretation in *WR* was applied.

121. At [43], the Advocate General said this:

> "The normal meaning of the words "holding" and "making the delivery" of goods used in the Directive is clear; they require only physical possession of the goods, In view of the absence of divergence in this respect between the various language version of the text, it may be concluded that the expression 'person holding the goods" covers anyone who is in physical possession of them unless that interpretation is contradicted by the purpose of the provision or by general principles of law."

122. Physical possession was not, however, an issue in that case as it was not in dispute and the referral to the CJEU assumed that the holder was in physical possession.

123. The agreement between the United Kingdom and the EU setting out the arrangements for the UK's withdrawal from the EU ('the Withdrawal Agreement') Treaty Series No. 3 (2020) provides for judgments of the CJEU handed down after 31 December 2020 to have "binding force in their entirety on and in the United Kingdom if given in respect of references made by the United Kingdom before the end of 2020.

124. The requirement for a "holder" to have physical possession was considered in more detail in *Dawson's (Wales) Ltd v HMRC* [2019] UKUT 0296 (TCC) ('*Dawson's*').

<u>*Dawson's*</u>

125. The case concerned a wholesaler of alcoholic drinks. HMRC assessed that it owed around £3,700,000 of excise duty on the basis that there was insufficient evidence that excise duty had been paid on certain supplies of goods made and physically held by it. HMRC traced the supply-chain back from Dawson's supplies to missing, de-registered or hijacked companies. Dawson's was assessed because HMRC had no evidence that excise duty was paid on the goods and could not establish that any of the companies appearing further back in the supply-chain took physical possession of the goods. The court, similarly, held that the starting point in

determining who is "holding" the goods at the relevant time must be the person who has physical possession of them. Once the physical holder of the goods is identified, the correct approach is to then consider whether the circumstances of that possession are such that it is inappropriate for that person to be considered to be holding the goods.

126. The UT's decision in *Dawson's* revolved around the issue of whether control involved physical possession (as HMRC argued), or included *de jure* or *de facto* control over the goods, even if the person did not have physical possession (as the taxpayer there argued to advance their case that HMRC should have assessed a person at an earlier duty point). Pending CJEU decision in *WR*, the UT in *Dawson's* proceeded on the basis of various propositions, at [131], derived from various other authorities before it, which included that an "innocent agent" of the person with *de jure* or *de facto* control was not holding, but that actual or constructive knowledge of physical possession of duty unpaid excise goods could take someone out of the status of an innocent agent.

127. The UT went on to note that, while none of the authorities had covered the situation where physical possession had not been established, they did require - when seeking to establish that a person without physical possession of goods could be regarded as their holder - establishment of the basis on which it was said that legal or *de facto* control of the goods was said to arise, at [136]. Thus, the issue of whether there was sufficient control in order to be "holding" had been highlighted as a key factor.

128. The UT summarised the matters that a person would have to show in order to successfully challenge an assessment on the basis that an earlier duty point could be established against which HMRC should have made an assessment (at [149]):

> (1) Who had physical possession at the time the alleged earlier excise duty point occurred?
>
> (2) Who is the person alleged to have *de facto* or legal control over the goods who it is said should be assessed rather than the subsequent holder and how that person is said to have such control and the basis on which it was being exercised?
>
> (3) The time at which the excise duty point arose. (The UT's view was that the date of an invoice was not sufficient in itself without establishing who was in possession of the goods at some identified point or points in time.)
>
> (4) Where the goods were being held at the relevant time.

129. On appeal, the Court of Appeal in *Dawson's* ([2023] 4 WLR 35), at [77], the court endorsed (1) (physical possession). Asplin LJ considered that that was supported by the CJEU's decision in the *WR* and "the touchstone was the physical possession of the excise goods". The court also endorsed points (3) and (4) (timing and location) (at [94]) and noted that (2) (regarding *de facto* or legal control) was not challenged ([86]); the burden of proof being on the party seeking to challenge the assessment: see [74] and [94] of the Court of Appeal's decision in *Dawson's*.

130. At [68], Asplin LJ confirmed this specifically in relation to the meaning of "holding" when commenting on the earlier decision in *Taylor v Wood*:

> "The court approached the question of "holding" at paras 29-30 solely from the perspective of domestic law. The concept of "holding" arises, however, in the Excise Directive (and the 1992 Directive before it) and is a principle of EU law which must be approached through that lens. As the UT pointed out at paras 93-94 of its decision, it is a well established principle that when interpreting a provision of EU law, it is necessary to consider not only the wording of the provision but its context and aims and that a term such as "holding" should have an autonomous meaning; *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03)

> EU:C:2005:322; [2005] STC 1547. Legislation implementing a provision of EU law must then be interpreted, so far as possible, in conformity with EU law, thus interpreted. That was not the approach which the Court of Appeal Criminal Division adopted"

131. The Court of Appeal held, at [76], that:

> "... Anyone in physical possession of excise goods who was assessed for excise duty would immediately point to the chain of supply and contend that there must have been an earlier release for consumption and a person in de facto or legal control of the goods before them and, accordingly, that they were not liable".

132. However, the circumstances and *de facto* and/or legal control of the goods must also be a factor to be considered. The court concluded that it is also possible for a person with control over the goods, as opposed to physical possession, to be treated as holding them. This is as a result of an absence of an earlier duty point. The court, however, found that it was up to the person assessed to establish that a person earlier in the supply-chain had been holding the goods and should be assessed instead. The court stated that in the absence of any evidence that establishes an earlier duty point, the person holding the goods at the time that it is established that the goods are being held at a specific location, but are no longer held pursuant to a duty suspension arrangement, is chargeable to the unpaid duty.

133. Asplin LJ went on to state, at [78], that:

> "As the Advocate General pointed out in the *Perfect* case, the meaning and scope of terms for which EU legislation does not provide a definition must be determined by reference to their usual meaning in everyday language whilst taking into account their context and the purpose of the rules in question. Furthermore there can be no doubt that "holding" must be given a consistent meaning in all Member States and throughout the Excise Directive. Nothing turns therefore upon the point that the *Perfect* case was concerned with the meaning of "holding" for the purposes of article 33 rather than article 7(2)(b). There is also no question but that the HMDP Regulations must be interpreted in conformity with the Excise Directive."

134. The Court of Appeal also considered that the UT in *Dawson's* had been correct to rely on the passage at [67] in *Davison & Robinson,* regarding HMRC not being able to make an assessment unless it had the necessary information (at [83] to [84]). The approach of the UT and Court of Appeal in *Dawson's* demonstrates that the determination of "holding" is a question of law and fact.

135. *Dawson's*, and the majority of cases considered in it, including *Perfect*, involve persons arguing that they should not be assessed to duty simply on the basis of having physical possession of excise goods.

Hartleb

136. The UT in *Agniezska Hartleb t/a Hartleb Transport v HMRC* [2024] UKUT 00034 (TCC) ('*Hartleb*') agreed with HMRC that a haulage company employer was "holding" the goods in the particular circumstances of her case, despite her argument that it was her employee driver who had physical possession of the goods and not her. The UT considered, at [78], the four factors identified by the UT in *Dawson's* regarding the need to establish an earlier duty point to be a useful guide in determining who to regard as "holder" in circumstances where physical possession and *de facto* and/or legal control were separated, as they were on the facts of the case before it.

137. As regards physical possession, the UT explained that was not determinative ([80]) and that a more detailed consideration of the facts was needed ([81]). Referencing the approach taken by the UT in *Dawson's* (at [143]), the UT in *Hartleb* held that it was consistent with the legislation and caselaw to adopt an approach which established first, who had physical

possession of the goods, but then considered whether the circumstances of that possession were such that it was inappropriate for that person to be considered to be "holding" the goods ([83]).

138. The UT found that the circumstances of the haulier's direction and control over her employee outweighed his actual physical possession of the goods. The UT held that:

> "81. The approach of the UT and Court of Appeal in Dawson demonstrates that the determination of "holding" is a question of law and fact. Although the initial focus, given the location of goods so giving weight to physical possession – that is not the end of the matter and a more detailed consideration of the facts is needed.
>
> ...
>
> 83. As the UT commented in Dawson it is consistent with the legislation and case law to adopt an approach that establishes first who has physical possession of the goods but then considers whether the circumstances of that possession are such that it is inappropriate for that person to be considered to be "holding" the goods (see [143] of the UT judgment)."

139. The appellant in *Hartleb* had directed her employee to deliver goods in accordance with an arrangement that she had made with the manufacturer of the goods. At [90], the UT held that:

> "On this straightforward combination of facts we consider it legally correct and consistent with the operation of the Excise Directive and so the HMDP Regulations to treat the Appellant and not her employee as holder. Put simply, the circumstances in which the Appellant had control outweigh the fact that physical possession of the excise goods was with her employee."

140. The UT's analysis in *Hartleb*, and its suggestion that the factors explored in *Dawson's* relevant to establishing whether someone was liable at an earlier duty point (which included control) were also useful to consider when examining whether someone was "holding" ([15]), show how the issue of control is one of a number of factors that fall to be considered when looking at whether it is inappropriate to consider someone with physical possession as "holding".

Turton

141. Whilst not binding on us, the FtT in *Turton v HMRC* [2021] UKFTT 0441 (TC) ('*Turton*') considered the application of *WR* in an appeal concerning the application of reg. 10 of the Excise Duty Regulations and said this:

> "77. According to the definition in WR, a person can be "holding" duty unpaid cigarettes for purposes of the 2008 Directive and the 2010 Regulations, both in circumstances (1) where the person knows that the goods they are holding are cigarettes or unspecified excise goods but does not know that they have become chargeable to any excise duty or that the excise duty has not been paid, and (2) where the person does not even know that the goods they are holding are cigarettes or unspecified excise goods. This is evident from the questions on which the Court of Appeal of England and Wales requested a preliminary ruling, and the wording of the preliminary ruling given by the CJEU. The Court of Appeal asked whether a person could be liable to excise duty in circumstances where that person "knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty ... at or prior to the time that they became so chargeable". The Court of Appeal then asked whether the answer to this question would be any different if the person did not know "that the goods he was in possession of were excise goods". (See WR at [20]). The CJEU answered these questions by stating that the person could be liable to excise duty both (1) where the person was "not aware that [the goods] are subject to excise duty", and (2) where the person was aware that the goods are subject to excise *duty but was "not aware that they have become chargeable to the corresponding excise duty"."*

142. Turning to the circumstances of the appeal before us:

143. Having considered all of the documentary and oral evidence, cumulatively, we are satisfied that the Appellant held the Goods. We give our reasons for so finding:

144. We have found that by his own oral evidence, the Appellant entered into an arrangement to receive, unload and store the Goods at the Premises. Whilst surveillance evidence was obtained by the police and handed over to HMRC, and whilst Officer Collingwood did not personal view this evidence, the Appellant readily admits to his role on the day of the seizure. We have found that the Appellant used his forklift to unload the Goods having directed the lorry driver to the Premises. At this point, the Appellant was in physical possession of the Goods.

145. The Appellant clearly also had direction and control over the Goods at this point. Once the Goods were in the Premises, the Appellant proceeded to lock the Goods away. The person who had access to the unit at this point was the Appellant. The Appellant was, therefore, able to control access to the Premises, where collection took place: *Van De Water v Staatssecretaris van Fianciën* [2001] All ER (D) 53 and *Hughes v HMRC* [2022] UKFTT 00400 (TC).

146. The Appellant reloaded some of the Goods onto a van and they were then taken to Peterborough. The Appellant readily admits that his employer did not have any knowledge of the arrangement that was in place. Furthermore, his employer was not present on the morning that the Goods were delivered by the lorry driver. This is not, therefore, a case where the Appellant's employer can be said to have had greater control over the Goods. Indeed, the Appellant's evidence was that he hoped that the delivery would be complete before the working day started (which would be before his employer had arrived). The Appellant remains a person identified as exercising control over the Goods at the earliest duty point identified by HMRC. The Appellant remains liable for the excise duty on the Goods he was holding even if it is the case that other people, who might also be liable with him, might also be assessed if they were also identified.

147. By his own oral evidence, the Appellant did not believe that the lorry driver was involved in the arrangement concerning the Goods. In respect of the other people who were present, the Appellant denied having seen D.D., despite D.D. being with A.L.A. Both D.D. and A.L.A have been held jointly and severally liable and they have not appealed against the assessments issued against them. The Appellant does not deny knowing D.D. and he failed to mention in interview that he knew that D.D. was present on the day of the seizure. During his interview, A.L.A. referred to having seen D.D. speaking to the Appellant. We find that it would be quite remarkable for the Appellant not to have seen D.D. when the undisputed evidence is that the Appellant loaded some Goods onto the van that D.D. and A.L.A were travelling in.

148. Despite referring to Vitus, the Appellant was said not to have provided any real assistance in establishing how to get hold of Vitus, and was considered to have been vague and inconsistent during his interview. During the hearing before us, the Appellant was still unable to shed any further light on Vitus' whereabouts. The Appellant has not been able to establish an earlier duty point other than that which came to light at the Premises.

149. The Appellant described the arrangement that he entered into as being one where he believed he could made "honest labour". We find that there is considerable force in Ms Beegun's submission that the Appellant displayed "wilful ignorance" in this respect. Whilst it may be the case that the Appellant did not know what he was getting involved in, the unintended consequences of any decision not to exercise due diligence are that the Appellant is unable to evade liability.

150. It is settled law that the fact that the Appellant may not have had any right to the Goods, or knowledge that duty had not been paid, is irrelevant. Caselaw further establishes that there is no "innocent agent" defence. The Appellant is strictly liable to the Assessment. Having

considered the authorities and the evidence, and on this straightforward analysis of the facts, we hold that the Appellant is liable for the unpaid duty because he was holding (within the meaning of the Excise Duty Regulations) the Goods delivered to the Premises. Furthermore, we find that the Appellant was able to control access to the Premises, upon which the collections took place.

151. The purpose of the Excise Duty Directive is to cast the net wide because to do otherwise would risk frustrating its purpose, leaving the excise duty system exposed to fraud, evasion or abuse. The objective (legitimate aim) of HMRC's powers to issue assessments is to secure the payment of excise duty which is owed. The use of such powers is appropriate to achieving that aim where a person holding goods is assessed at the first assessable duty point. We accept that the reasonable inference that can be drawn from the evidence is that the Appellant held excise goods.

152. The Appellant has raised his impecuniosity as a reason for being unable to pay the Assessment. Section 8(5) FA 1994 however provides that**:**

> "(5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say-
>
> (a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;
>
> (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of duty."

153. The principle of fairness and proportionality is specifically addressed in the Tribunal's decision of the FtT in *Charlene Hughes v HMRC* [2022] UKFTT 00400 (TC), at [77]:

> "Whilst the Tribunal has every sympathy for the Appellant's personal circumstances.... and accepts that the assessment may be financially ruinous, none of those matters are grounds for allowing an appeal against an assessment."

154. The burden of proving that an earlier duty point can be established lies on the person seeking to resist the Assessment. In this appeal, that person is the Appellant. We find that the Appellant has failed to do so. Our findings and conclusions are based on a balanced appraisal of all of the facts.

CONCLUSIONS

155. On the basis of our findings above, we hold that:

(1) The Appellant is liable to the Assessment because he held the Goods within the meaning of reg. 6(1)(b) of the Excise Goods Regulations.

(2) A person may be said to be "holding" goods for the purposes of the Excise Duty Regulations if they are in "physical possession" of the goods.

(3) The word "held" must be given an ordinary and natural meaning, with an eye to preventing fraud. It does not require one to have been "caught red-handed".

(4) It is irrelevant whether the Appellant has any right or an interest in the Goods, and it is also irrelevant whether or not the Appellant is, or should be, aware that the Goods were subject to or have become chargeable to excise duty.

(5) "Knowledge", or "means of knowledge", is irrelevant to whether an individual is liable or not.

156. Accordingly, therefore, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

157. 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.

Release date: 09th JANUARY 2025