Appeal number: UT/2017/0146

EXCISE DUTY – preliminary issue - person holding goods where excise duty unpaid - assumed earlier release for consumption but facts as to how when and where that release occurred not established - whether person holding goods liable to be assessed for the unpaid duty - whether B & M Retail Limited v HMRC [2016] UKUT 49 (TCC) correctly decided - EU Directive 2008/118 Article 7 and Regulations 5 and 6 Excise Goods (Holding, Movement and Duty Point) Regulations 2010

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DAVISON & ROBINSON LIMITED

Appellant

- and -

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

TRIBUNAL: The Hon Mr Justice Fancourt
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4A 1NL on 27 and 28 November 2018

Geraint Jones QC, instructed by Jarmans Solicitors, for the Appellant

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

DECISION

Introduction

1. This is the appeal of the appellant ("D&R") from the decision of the First-tier Tribunal ("FTT") (Judge Barbara Mosedale) on a preliminary issue released on 31 July 2017 (the "Decision"). The matters under appeal to the FTT are an excise duty assessment of £400,068 issued to D & R on 18 July 2013 (the "Assessment") and a penalty assessment of £80,013.60 issued on 31 January 2014 in respect of the circumstances which gave rise to the Assessment. The basis of the Assessment was that the owner of a warehouse was holding excise goods owned by D & R in respect of which excise duty had not been paid and D & R as the owner of the goods was involved in that holding and was therefore jointly and severally liable to pay the duty with the warehouse owner.

2. The preliminary issue determined by the FTT was whether only one excise duty point can arise in respect of specific goods, and, if the facts were found to be as assumed at [6] below, such a duty point must have arisen before D & R purchased the goods and therefore D & R could not be, as it was, assessed on the basis of a later duty point arising as a result of it holding the goods in its nominated warehouse.

3. This issue had previously been considered by the Upper Tribunal in the case of *B & M Retail Limited v HMRC* [2016] UKUT 429 (TCC) ("*B & M"*). It was decided in that case that it is open to HMRC to assess a person who is found to be holding excise goods outside a duty suspension arrangement in circumstances where excise duty on those goods has not been paid, unless an earlier duty point can be established on the facts such that a person can be assessed to duty in respect of it.

4. On the assumed facts in this case, as described below, an earlier duty point cannot be established and assessed and accordingly the FTT decided that it was bound by the decision in *B & M* and decided the preliminary issue in favour of HMRC.

5. On 29 September 2017 the FTT gave D & R permission to appeal against the Decision in order to give D & R the opportunity to argue before the Upper Tribunal that its previous decision in *B & M* was wrongly decided.

6. In the alternative to its primary case that *B & M* was wrongly decided, D & R requests the Upper Tribunal to refer the issue to the Court of Justice of the European Union ("CJEU").

Assumed Facts

7. The preliminary issue was determined by the FTT on the basis of assumed facts which were set out at [4] to [10] of the Decision as follows:

> "4. The appellant purchased alcoholic goods (a mixture of red, white and rosé wine of the brands and in the quantities as specified in the annex to this decision) from C&C Brands Ltd on dates between July 2011 and April 2012. The goods

were delivered on the appellant's instructions on each occasion to a warehouse at Unit 5, Springhill Road, Grimethorpe, Barnsley ('the warehouse') owned and operated by Wormall Developments Ltd, who held them to the appellant's order.

5. Wormall Developments Ltd were not registered to, and did not hold, the goods in question in excise duty suspension. It is not known whether the goods were ever held in a duty suspension arrangement.

6. The appellant had no evidence, and did not seek to prove, that the goods in question had had the applicable UK excise duty paid, relieved, remitted or deferred under a duty deferment arrangement in respect of them at any point.

7. The appellant had no evidence of, and did not seek to prove, who delivered the goods to the warehouse nor of where the goods were held before being held in the warehouse.

8. HMRC have identified the chain of suppliers who supplied the goods in question to C&C Brands Ltd. The chain traced back to a trader who has not been located or contacted by HMRC. The appellant had no evidence, and did not seek to prove, that any of the identified suppliers had paid excise duty in respect of the goods in question. The appellant had no evidence, and did not seek to prove, that any of the identified suppliers held or stored the excise goods in question.

9. On 18 July 2013, the appellant was assessed under Regulation 10(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the Regulations') for £400,068 on the basis that it was jointly and severally liable for the excise duty assessed on Wormall Developments Ltd, on the same date, under Regulation 10(1) of the Regulations.

10. An excise wrongdoing penalty in relation to the above assessment was imposed on the appellant under s 41 Finance Act 2008."

Issues to be determined

8. HMRC gave the following explanation in its letter of 18 July 2013 for issuing the Assessment:

> "Davison & Robinson Ltd are considered to be Joint [sic] & Severally liable as per The Excise Goods (Holding, Movement and Duty Point) Regulations 2010, reg 10(2). The reason for that is that Davison and Robinson Ltd own the goods in question, have instructed C&C Brands Ltd where to deliver the goods, arranged for You Call We Haul Ltd to accept the goods for storage on their behalf and been responsible for the onward distribution of the goods."

9. D & R has appealed the Assessment and the associated penalty on the basis that under the scheme for assessment of excise duty established by the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "Regulations") only one excise duty point can arise in respect of identified goods; and on the basis of the assumed facts set out above, such duty point must have arisen before the goods were purchased by D & R and delivered to Wormall Developments Ltd (trading as You

Call We Haul). This was because under Regulation 5 of the Regulations an excise duty point arose when the goods were released for consumption in the UK, and in order for D & R to purchase the goods for them to be delivered to its nominated warehouse, the goods must already have been released for consumption within the UK (within the meaning of Regulation 6 (1) of the Regulations). As D & R and Wormall Developments Ltd were not the persons owning or holding the goods at the time of the original release for consumption within the UK, D & R contends it was not liable to pay the duty and the Assessment and penalty imposed on it should be discharged.

10. D & R contends that the above analysis is unaffected by its and HMRC's inability to identify any of the following:

(1) the place the goods were first released for consumption in the UK;

(2) the date the goods were first released for consumption in the UK;

(3) the persons involved in the first release for consumption in the UK.

11. HMRC contend that once any of the events that give rise to a release of excise goods for consumption in the UK has occurred, then it is incumbent on it to ensure that excise duty on those goods is paid. Therefore, in circumstances where it is unable to assess any person who caused a prior release for consumption to occur, because it is not able to establish how, when, where and by whom such release from consumption occurred, it is open for it to assess the person who is found to be holding the goods where no evidence of payment of excise duty in respect of those goods can be obtained. The basis of such an assessment would be that such holding of the goods gave rise to the only excise duty point HMRC were able to establish on the facts before them, in the absence of any satisfactory evidence which established any earlier event that may under the Regulations have given rise to the goods being released for consumption in the United Kingdom.

12. HMRCs contentions are supported by this Tribunal's decision in *B & M*, which decided the same issue in favour of HMRC on very similar facts to the assumed facts in this case. The normal rule is that the Upper Tribunal follows other Upper Tribunal decisions unless convinced that they are wrong: see *HMRC v S & I Electronics Limited* [2012] UKUT 87 (TCC) at [15]. Accordingly, it was common ground that we must dismiss this appeal if D & R is unable to persuade us that *B & M* was wrongly decided, unless we decide to refer a question to the CJEU.

Relevant legislation

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

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

15. Article 2 provides that:

> "Excise goods shall be subject to excise duty at the time of:
>
> (a) their production, including where applicable, their extraction, within the territory of the Community;
>
> (b) their importation into the territory of the Community"

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

> "1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.
>
> 2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:
>
> (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
>
> (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
>
> (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
>
> (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.
>
> 3. The time of release for consumption shall be:
>
> (a) in the situations referred to in Article 17(1)(a)(ii), the time of receipt of the excise goods by the registered consignee;
>
> (b) in the situations referred to in Article 17(1)(a)(iv), the time of receipt of the excise goods by the consignee;
>
> (c) in the situations referred to in Article 17(2), the time of receipt of the excise goods at the place of direct delivery.

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

> "1. The person liable to pay the excise duty that has become chargeable shall be:
>
> (a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):
>
> (i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;
>
> (ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;
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> (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;
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> (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."

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

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

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

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

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

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

…

6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find an excise duty has become chargeable and has been collected in that Member State."

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

"(1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ("the excise duty point").

(2) Where regulations under this section fix an excise duty point for any goods, the rate of duty for the time being in force at that point shall be the rate used for determining the amount of duty to be paid in pursuance of the requirement that takes effect at that point.

(3) Regulations under this section may provide for the excise duty point for any goods to be such of the following times as may be prescribed in relation to the circumstances of the case, that is to say—

(a) the time when the goods become chargeable with the duty in question;

(b) the time when there is a contravention of any prescribed requirements relating to any suspension arrangements applying to the goods;

(c) the time when the duty on the goods ceases, in the prescribed manner, to be suspended in accordance with any such arrangements;

(d) the time when there is a contravention of any prescribed condition subject to which any relief has been conferred in relation to the goods;

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

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

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

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

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

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

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

23. Regulation 6(1) states as follows:

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

(a) leave a duty suspension arrangement;

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

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

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

24. Regulation 7(1) provides:

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

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

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

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

(b) they are consumed;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Decision in *B & M*

28. As mentioned above, the facts in *B & M* were very similar to the assumed facts in this case. HMRC assessed B & M to excise duty on a large quantity of beer and wine held by it in its own warehouse on the grounds that on the balance of probabilities excise duty had not been paid on the goods and that it had not been able to establish an earlier excise duty point.

29. The competing positions of the parties were expressed in similar terms to those in this case. There were summarised by the Tribunal at [67] as follows:

> (1) "HMRC contended that the recognition by them that other excise duty points must, in principle, have been triggered prior to B & M receiving the goods did not preclude them from assessing B & M for excise duty in respect of the goods pursuant to Regulation 6 (1) (b) of the Regulations, because there was no satisfactory evidence before HMRC which established any earlier event such as to ground an assessment based on Regulations 6 (1) (a), (c) or (d).
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> (2) B & M contended that excise duty becomes chargeable on particular excise goods only once in a particular Member State, although by virtue of Article 33 it can be charged in two different Member States. Excise duty becomes chargeable only when goods have been released for consumption, and such a release can only occur on one occasion in any one Member State. Once the goods have been released for consumption that is the time excise duty becomes payable at one of the four excise duty points prescribed by Regulation 6. Once one of those four excise duty points has occurred, regardless of whether it can be established when, how, where

and by whose agency such an event occurred, there is no scope for any further excise duty point because the goods have already been released for consumption."

30. The Tribunal carried out an analysis of a number of European authorities which were relied on by HMRC in support of their submissions. Those from which the Tribunal said that it derived assistance were summarised as follows.

31. The first case was the CJEU's judgment in Case C-325/99 *G van de Water v Staatsecretaris van Financien* [2001] ECR I-5163. The Tribunal summarised that judgment at [93] to [100] as follows:

> "93…… The relevant facts were that Mr van de Water had acquired from a third party at least 2000 litres of pure alcohol which he used in order to manufacture gin with the help of others in a rented shed. None of these products, which were subject to excise duty, were covered by customs documents, nor was the shed authorised for use as a tax warehouse. Mr van de Water was assessed for excise duty in respect of both the gin and the pure alcohol found in the shed. The basis of the assessment under the relevant Netherlands law was that he had infringed the law by manufacturing and holding goods subject to excise duty on which that duty had not been charged, and his appeal was dismissed on the grounds that he had not produced any evidence showing that the excise duty had been paid.
>
> 94. There was a reference to the ECJ of the question whether the mere holding of a product subject to excise duty could be regarded as a release for consumption, if and insofar as duty had not already been levied on it pursuant to the applicable provisions of Community law and national legislation.
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> 95. This case predated the 2008 Directive and accordingly the relevant Community law was to be found in the 1992 Directive. The terms of the charging provisions, contained in Article 6(1) of the 1992 Directive, were broadly equivalent to those contained in Article 7 (2) of the 2008 Directive except in one important respect. Article 6 of the 1992 Directive did not contain the equivalent of Article 7 (2) (b) of the 2008 Directive and accordingly there was no specific provision that the holding of excise goods outside a duty suspension arrangement where excise duty had not been levied in itself amounted to a release for consumption.
>
> 96. It was also the case that the 1992 Directive, unlike the 2008 Directive, did not contain provisions determining the person from whom the duty should be claimed, which therefore fell to be determined under national law. The ECJ referred to this point at [28] of its judgment in the following terms:
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> > "The Commission, for its part, observes that Article 6 (1) of the Directive is designed to establish the point in time at which the excise duty becomes actually chargeable, and not to determine the person from whom the duty should be claimed. According to the Commission, where a product subject to excise duty on which that duty has not been levied is located outside the closed circle of tax warehouses, and thus outside a suspension arrangement, it necessarily follows that that product must at some point have been manufactured or imported outside such an arrangement or have

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

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

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

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

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

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

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

32. At [104] the Tribunal held that [34] of the judgment was consistent with a finding that the mere fact of the holding of goods by Mr van de Water outside a duty suspended arrangement was clear evidence that the goods had left such an arrangement and were therefore chargeable to duty. The Tribunal observed that the CJEU was in no doubt that it was the duty of the national authority to ensure that the duty was paid, and that objective clearly could not be achieved in a situation where the earlier intervention of a person (other than the person holding the goods) which caused the termination of the suspension arrangement could not be established. The Tribunal then said that the case offered strong support for the proposition that both the 1992 and the 2008 Directives envisage that a person who was found to be holding goods in respect of which excise duty has not been paid can be held liable for the duty in circumstances where it has not been possible to establish when, how, where or by whose agency an earlier release for consumption took place. The Tribunal also observed that this was consistent with the following statement by the Advocate General at [40] of his opinion, which the Tribunal said was reflected at [36] and [41] of the CJEU's judgment:

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

33. At [105] the Tribunal made reference to its earlier observation at [26] of its decision that the Directive draws a distinction between the concept of chargeability to excise duty and the levy and collection of that duty. The Tribunal observed that as provided by Article 7 (1), excise duty becomes "chargeable" at the time of release for consumption but, as provided in Article 9 must be "levied and collected" (which the Tribunal regarded as synonymous with "assessed") according to the procedure laid down by the relevant Member State. The Tribunal held that there cannot be an assessment unless the person to be assessed can be identified. It went on to say:

> "This cannot happen, in relation to a release from suspension occurring prior to a person holding the goods, where there is no evidence as to how, where, when and by whose agency the release from suspension occurred. In that situation it appears to us that excise duty may have become "chargeable", but it clearly has not been "levied". This is therefore consistent with a scheme that permits an assessment to be made on a person holding excise duty goods outside a duty suspension arrangement, where excise duty has become chargeable as a result of

> the termination of that arrangement but has not been assessed because of the lack of evidence as to the circumstances of that termination. Although *Van de Water* did not deal specifically with the question whether there could be more than one release for consumption of the same goods in the same Member State, in our view the reasoning in the case is consistent with that possibility arising. In our view it is also implicit in the reasoning that there can be no more than one assessment to duty in respect of the same goods."

34. In our view, it is clear that when the Tribunal was referring to the possibility of there being "more than one release for consumption of the same goods in the same Member State" it was, as it did at other points in the decision, referring to a theoretical or unidentified release from consumption rather than one which had been established on the facts. The Tribunal's reasoning was that the only "release for consumption" that mattered for the purposes of raising an assessment was one where it had been established when, how, where and by whom the relevant event had occurred.

35. The second case was Case C-64/15 *BP Europa SE* [2016] ECLI: EU:C: 2016:62 which was cited by HMRC to support its submission that the term "release for consumption" should be interpreted in context and taking account of its purpose. The Tribunal summarised the CJEU's judgment in that case at [109] to [111] as follows:

> "109…. In that case a large quantity of gas oil (which is a product subject to excise duty) was moved from a tax warehouse in the Netherlands to a tax warehouse in Germany under a duty suspension arrangement. On delivery, the owner of the tax warehouse in Germany found that the amount received was significantly less than that stated on the electronic administrative document which accompanied the load.
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> 110. The ECJ referred to excise duty being a tax on consumption in the following terms at [32] of its judgment:
>
> > "Furthermore, since excise duty is a tax on consumption, as stated in recital 9 of directive 2008/118, based on the amount of goods offered for consumption, the point at which the duty becomes chargeable must be fixed in such a manner that the amount of goods concerned can be measured precisely. In the light of that objective, Article 20 (2) of that directive, by stating that the movement of excise goods under a duty suspension arrangement ends when the consignee has taken delivery of those goods, must be interpreted as meaning that that taking delivery must be regarded as occurring when the consignee is in a position to know precisely what quantity of goods he has actually received."
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> 111. Accordingly, the fact that there was a shortage of goods on delivery meant that there had been a "release for consumption" of that portion of the load which had not been delivered. The ECJ said at [43] of its judgment:
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> > "The finding of shortages on delivery of excise goods under a duty suspension arrangement reveals a situation which is, of necessity, in the past where the missing goods did not form part of that delivery and the movement of which did not, accordingly, end in accordance

with Article 20 (2) of directive 2008/118. In consequence, that situation constitutes an irregularity within the meaning of Article 10 (6) of that directive. An irregularity of that type of necessity gives rise to a removal from the duty suspension arrangement and, as a result, a release for consumption as presumed under Article 7 (2) (a) of that directive."

36. The Tribunal then said at [112]:

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

37. The final case was *Gross v Hauptzollamt Braunschweig* [2014] ECLI: EU: C: 2014:2042. The Tribunal summarised that case at [113] and [114] as follows:

> "113…. The facts were that Mr Gross had repeatedly taken delivery of cigarettes which had been smuggled into Germany and in respect of which excise duty had not been paid in order to resell them. The cigarettes had been brought from another Member State into German territory for commercial purposes outside a suspension arrangement. Mr Gross had obtained the products from other persons after those products had been unlawfully brought into Germany, and the question for the ECJ was whether Mr Gross could be assessed for duty even though there had been prior holders of the goods in Germany. The relevant provision to be interpreted was Article 7 of the 1992 Directive, which made provision for products subject to excise duty already released for consumption in one Member State but which were then held for commercial purposes in another Member State to be assessed to excise duty in the second Member State. Article 7 (3) of the 1992 Directive provided that the duty should be due from, among others, "the person making the delivery or holding the products intended for delivery or from the persons receiving the products for use in the [second] Member State".
>
> 114. The ECJ held that Mr Gross could be assessed as a person who received the products in question, notwithstanding that there had been previous holders of the goods in Germany. Its reasoning was set out at [25] and [26] as follows:
>
> > "25. In particular, in expressly providing that the person "receiving the products" at issue may be liable to excise duty on products subject to that duty released for consumption in a Member State and held for commercial purposes in another Member State, Article 7 (3) of Directive 92/12 must be

interpreted as meaning that any holder of the products at issue is liable to excise duty.

26. A more restrictive interpretation, to the effect that only the first holder of the products at issue is liable to excise duty, would defeat the purpose of Directive 92/12. Under that directive, the movement of products from the territory of one Member State to that of another may not give rise to systematic checks by national authorities, which are liable to impede the free movement of goods in the internal market of the European Union. Consequently, such an interpretation would render more uncertain the collection of excise duty due upon the crossing of an EU border." "

38. The Tribunal then explained at [115] to [118] how the reasoning of the CJEU in that case supported what the Tribunal had deduced to be the policy behind the 1992 Directive and the 2008 Directive as follows:

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

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

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

delivering or receiving the goods is liable to be assessed for the outstanding duty.

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

39. At [135] the Tribunal began its analysis of the Regulations and the enabling legislation for them. It started by referring to its previous observation at [39] that in interpreting the Regulations, a national court must interpret domestic legislation implementing a Directive, so far as possible, in the light of the wording and purpose of the Directive which it seeks to implement: see *Vodafone 2 v HMRC* [2010] Ch 77, as reaffirmed by the Supreme Court in *Swift v Robertson* [2014] 1 WLR 3438.

40. The Tribunal dealt with B & M's contentions at [139] to [145] as follows:

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

140. Whilst there is a specific reference in s 1 (3) to the time at which goods cease to be the subject of suspension arrangements being a time which may be specified as an excise duty point, there is no specific reference to the holding of goods in circumstances where duty has not been paid being such a time as may be specified. However, s 1 (3) (e) gives power to specify "such time after the time which, in accordance with regulations made by virtue of any of the preceding paragraphs, would *otherwise* be *the* excise duty point...". Aside again from the use of the

definite article, we note that this indicates that any excise duty point specified pursuant to this power would be an alternative to any of the other events specified by virtue of the preceding paragraphs rather than be capable of applying as a second excise duty point. The wording of this provision therefore offers some support for the proposition that such an excise duty point may be prescribed in circumstances where it is not possible to establish any of the other excise duty points prescribed by the regulations.

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

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

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

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

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

provision to the duty not having been paid, wherever and however that may have happened."

41. The Tribunal then concluded at [148] that assessing a person found to be holding goods in respect of which excise duty had not been "levied", in circumstances where it necessarily follows that in principle a prior release for consumption occurred, is consistent with the purpose of the 2008 Directive and its predecessor. Its reasoning was set out at [149] as follows:

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

42. The Tribunal then dealt with concerns as to how HMRC might exercise its discretion in deciding who to assess cases where there may have been a succession of persons who have had an involvement with the goods at [150] to [153] as follows:

> "150. We accept that, if the correct interpretation of the 2008 Directive is that there can be more than one release for consumption in respect of the same goods, then which of the various persons who may have had some involvement with the goods is to be assessed for duty in respect of those goods will in many cases depend on the exercise of discretion on the part of HMRC. In relation to their policy in this regard, as Mr Beal explained it to us, HMRC appear to exercise their power to assess on the basis that only one assessment can be made in respect of the same goods. That in our view is consistent with our interpretation of the 2008 Directive and the policy behind it. As we record at [69] above, HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before them to assess any other person who is liable for the excise duty by virtue of any earlier excise duty point that may have occurred.
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> 151. As we have observed, Article 9 of the 2008 Directive gives a wide discretion to Member States as to the procedure is to be followed for the collection and, where appropriate, reimbursement or remission of duty.

> 152. There is nothing that we can see in the 2008 Directive or the Regulations (which appear to us to be silent in relation to these issues) that indicates that this approach is in any way inconsistent with the 2008 Directive. Indeed, we can see the merit of having a clearly established policy rather than giving individual officers complete discretion as to who should be assessed out of the numerous persons who HMRC may discover have handled the goods in the supply chain while the duty remained unpaid. The lawfulness of that policy, and the manner in which individual decisions are taken pursuant to it, would of course be subject to supervision through the medium of judicial review. Because of this element of supervision, and because it is inherent in the framework laid down by the 2008 Directive that Member States are given a wide discretion as regards collection and reimbursement, we do not consider that the discretion given to HMRC in the present context infringes the constitutional principle enunciated by Lord Wilberforce in *Vestey*. As a consequence, any lingering concerns that a member of the public in possession of a quantity of wine purchased from a retailer, but in respect of which excise duty had not been paid, might find himself assessed with the unpaid duty should in practice be allayed, provided that HMRC follow their stated policy.
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> 153. B & M are, it appears, troubled in this case that HMRC are not following their own stated policy in certain respects: see our summary of Mr Baldry's submissions at [89] and [90] above. B & M wish to be satisfied that there are not in fact earlier points in the supply chain where an excise duty point could clearly be established on the evidence, or might be if such an investigation were in their view more vigorously pursued. We would be inclined to agree that it would not be in the interests of justice that HMRC should simply be able to sit back and say that the burden is on the taxpayer to provide the evidence to displace its liability, when the evidence that HMRC do actually have is in fact sufficient to demonstrate, objectively, that an earlier excise duty point could be established. We are in no position, however, to say whether that is the position in the present case, and any concerns of that nature would anyway have to be pursued through the medium of judicial review."

43. At [154] the Tribunal stated that it was satisfied at the relevant principles of EU law were sufficiently clear that it was not necessary to make a reference to the CJEU.

44. The Tribunal concluded at [155] to [157] as follows:

> "155. Our analysis of the wording of the 2008 Directive, and of the policy considerations which are evident from its recitals and the observations in the authorities about the need to ensure that unpaid excise duty is collected when goods have been released for consumption within the EU, leads us to conclude that the correct interpretation of the 2008 Directive, and consequently the Regulations, is that once any one of the four events mentioned in Article 7 of the 2008 Directive has occurred then it is incumbent on the Member State in question to ensure that the duty is paid. Therefore, in circumstances where it is unable to assess any person who caused a prior release for consumption to occur, it is open to the Member State to assess, in accordance with its own procedures, any person who is

found to be holding the goods within the meaning of Article 7 (2) (b) of the 2008 Directive.

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

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

Discussion

45. We start by summarising at [46] to [59] below the arguments made by Mr Geraint Jones QC, who appeared on behalf of D & R, as to why in his submission *B&M* was wrongly decided.

46. First, the Upper Tribunal failed to apply the accepted and usual canons of statutory construction. Although Mr Jones accepts that a purposive approach should be applied when considering the meaning of regulations intended to give effect to EU Directives, the principles of statutory construction applicable to domestic law should not be ignored. In particular, the so-called golden rule, as defined by Lord Wensleydale in *Grey v Pearson* [1857] H.L. Cas 61 is of relevance. This rule provides that the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the word may be modified so as to avoid the absurdity and inconsistency.

47. In *B&M* the Upper Tribunal at [149] divined that the policy behind the 2008 Directive was that Member States should take all necessary steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the EU alongside goods where duty had been paid because that would be a clear distortion of the internal market. Accordingly, at [145] it held that Regulation 6 (1) (b) of the Regulations was intended to apply in circumstances where goods in respect of which excise duty has not been paid are being held but it has not been possible to establish an excise duty point at any earlier point in time. However, it is not for the judiciary to make policy whilst using the pretence of purposively construing a Directive or Regulation: that is a matter for Parliament and the EU legislature. The wording of the Recitals to the 2008 Directive give no indication that the purpose of the 2008 Directive is to ensure that all or any payable excise duty is in fact paid by

somebody or that the 2008 Directive places the risk of non-payment by the person responsible for releasing goods for consumption upon (innocent) third parties. That is particularly pertinent given the statutory provision contained in s 154 (2) of the Customs and Excise Management Act 1979, which places the burden upon a person against whom an assessment has been raised to prove that the goods are duty paid. That is usually an almost impossible task if the person who should have paid the duty has not been identified by HMRC.

48. Second, the underlying purpose of the 2008 Directive is best discovered from its Recitals. Recital 8 proceeds on the basis that 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." This recital is predicated on the basis of there being only one person liable to pay the excise duty and that, in turn, can only arise if there is only one release for consumption. That single release for consumption occurs when whichever of the four events specified in Article 7 first occurs and once such an event has occurred, whether or not the taxing authorities are aware how, when, where and by whom it occurred, there is no scope for a further release for consumption to arise. The triggers for duty to become payable, set out in Article 7 of the 2008 Directive and Regulation 6 of the Regulations, are not sequential, but are, of necessity, alternatives. The use of the definite article in both the 2008 Directive and the Regulations is strongly indicative of the true construction, being that only one duty point can arise in respect of any goods in any EU state.

49. Furthermore, Recital 8 speaks to a single person being liable to pay the excise duty. If the 2008 Directive had intended to refer to multiple persons possibly becoming liable to pay excise duty, it would have stated so, that is by saying "who the **persons** liable to pay the excise duty **are**".

50. Recital 11, which refers to circumstances where an irregularity in the movement of excise duty goods occurs recites that excise duty should then be due in the Member state on whose territory the irregularity has been committed "which has led to "**the** release for consumption". Likewise, Recital 17 refers to the possibility of excise duty goods moving within the EU under suspension of excise duty "prior to their release for consumption" which plainly envisages only one release for consumption.

51. Recital 19 expresses the purpose of the Directive to provide for payment of excise duty, in the event of any irregular movement being catered for by a guarantee (provided, for example, by the tax warehouse consignor), which is indicative of how the risk of non-payment of duty is being addressed. Such a risk would not exist if the duty could be levied against whoever held the goods at any given point in time.

52. Third, in *B & M* the Upper Tribunal departed from the plain and obvious construction of the 2008 Directive and the Regulations solely on the basis that policy considerations require it to give an extended and artificial construction to those provisions. That was a flawed approach which failed to take into account the warnings given by the Supreme Court in *R (Buckinghamshire County Council and others) v Secretary of State for Transport* [2014] UKSC 3 that due to the nature of the EU legislative process it can never be assumed that particular objectives have been

achieved to the fullest possible degree. Mr Jones referred to the following observations of Lord Carnwath at [170] to [171]:

> "170. It is a common place in legislation that objectives may not be fully achievable or achieved. Compromises or concessions have to be made if legislators are to achieve the enactment of particular provisions. This is perhaps especially so at the international European level, in the case of measures agreed by the Council of Ministers where different Member States may only have been prepared to go part of the way with a Commission proposal (or Parliamentary proposal for amendment) and qualifications may have to be introduced to arrive at any agreement. The structure of the European Union involves a balance of interests which must be respected if the structure is to be stable.
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> 171. When reading or interpreting legislation, it can never therefore be assumed that particular objectives have been achieved to the fullest possible degree. Limitations on the scope or application of a legislative measure may have been necessary to achieve agreement. There may also have been good reasons for limitations, of which courts are unaware or are not the best judge. Where the legislature has agreed a clearly expressed measure, reflecting the legislators' choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or "improve" it in respects which the legislator clearly did not intend."

53. Fourth, Article 38 of the 2008 Directive gives further support for there being scope for excise goods to be subject to only one release for consumption and therefore only one excise duty point. That article makes provision for the situation where an irregularity occurs during a movement of excise duty goods in a Member State other than the Member State in which they were released for consumption. It provides that the irregularity shall be deemed to have occurred and the excise duty shall be chargeable in the Member State where the irregularity was detected and that the excise duty shall be due from the relevant guarantor of the payment of the duty and from any person who participated in the irregularity. Thus, excise duty becomes payable in consequence of there having been an irregularity in the movement of the goods, not because of a second release for consumption, with the result that only those persons who are proximate to the irregularity concerned are liable to be assessed. This provision would be otiose on the basis of the reasoning in *B & M* because the persons causing or involved in the irregularity could be assessed on the basis that they were holding the goods concerned.

54. Fifth, Regulations 17 to 19, 80 and 84 of the Regulations, contain specific provisions dealing with irregularities in the movement of excise duty goods or their irregular removal from a tax warehouse. Those provisions are the full (and only) extent to which either the 2008 Directive or the Regulations make provision for more than one excise duty point and those provisions would have been wholly unnecessary and otiose on the basis of the reasoning in *B & M*.

55. Sixth, the reasoning in *B & M* results in innocent persons becoming liable to be assessed for excise duty in an unprincipled fashion. For example, Mrs Smith, who runs a modest corner shop, goes into the local cash-and-carry and buys a case of gin at the usual wholesale price. Unbeknown to her, the gin had been bought by the

wholesaler at a knockdown price because duty had not been paid on it and the wholesaler had thus made an enhanced profit. According to the Upper Tribunal's findings in *B & M*, Mrs Smith is liable to pay the duty by reason of Regulation 6(1)(b) because she is holding excise goods and cannot demonstrate that the duty has been paid. In effect, Mrs Smith has had to shoulder the risk of non-compliance with the duty payment regime by others and has been financially penalised for HMRC's failings in policing the duty payment regime. This is not a risk that Mrs Smith is equipped to guard against, but in effect she becomes a guarantor of the unpaid duty and the purpose of the Directive is not to make an innocent third party a guarantor for the unpaid excise duty.

56. If HMRC fails in its duty to police the duty payment regime, so that excise duty is not paid when it should have been, HMRC can pass the burden of its failure to third parties who have no culpability for the non-payment of duty when another duty point is reached and purchase the goods believing them to be duty paid, thus creating an injustice and financial hardship.

57. Likewise, even the Royal Mail (a bailee for reward) was liable to be assessed by HMRC if it was found to be transporting goods in respect of which the duty had not been paid.

58. Seventh, it is no answer to say that HMRC would assess the earliest identified person who held the goods, rather than somebody who held them subsequently. If the first identified person to hold the goods was impecunious, then HMRC would and could exercise an administrative discretion to pursue a subsequent holder of the goods. As established in *Vesty v IRC* [1980] AC 1148, it is against constitutional principle for the amount of the taxpayer's liability to be decided by an administrative body: see Lord Wilberforce at page 1172 E.

59. Eighth, in the example of Mrs Smith given above, her rights not to be deprived of her property will have been infringed, which would be unlawful under s 6 Human Rights Act 1998 as a breach of Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). The policy transfers the duty payment and collection policing function from the State to the non-culpable citizen who has no ability, responsibility and/or resources to undertake any such policing function and therefore amounts to an infringement of A1P1 in that the policy fails to give any consideration to the issue of proportionality.

60. Whilst the second paragraph of A1P1 does not impair the right of the State to secure the payment of taxes, the construction of the 2008 Directive and the Regulations preferred by the Upper Tribunal in B & M would, of necessity, involve interference with the property of a third party because the effect of its construction is to transfer the liability to pay excise duty from the person who became liable when the goods crossed the duty point to potentially numerous third parties, regardless of their primary liability to pay for the excise duty. The imposition of a secondary liability or a liability akin to that of a guarantor is not the imposition of a liability to pay tax, in respect of which interference with property so as to secure payment can be

justified under A1P1 but is an interference with property to enforce a subsidiary, secondary or guarantor-like liability.

61. Despite Mr Jones's skilful submissions, he has been unable to persuade us that *B & M* was wrongly decided. On the contrary, we are satisfied, for the reasons set out below, that the decision was correct for the reasons the Upper Tribunal gave.

62. As far as the Upper Tribunal's approach to the construction of the Directive is concerned, in our view the Tribunal correctly approached the issue by ascertaining the purpose behind the 2008 Directive, not only from the words used but also the judgments of the CJEU on which it relied.

63. We reject Mr Jones's submission that the Upper Tribunal was impermissibly making policy. The basis of its finding that the policy behind the 2008 Directive was that Member States must ensure that excise duty debts are collected is to be found in the statement to that effect at [41] of *van de Water* quoted at [100] of its decision, as set out at [31] above, and the statement of the Advocate General at [40] of his opinion quoted at [32] above. The EU single internal market would be undermined if duty-paid goods were mixing unchecked with duty-unpaid goods. There was clearly therefore a basis for the Upper Tribunal's findings as to the purpose of the 2008 Directive to be found not only from the wording of the Directive itself, but also from a CJEU judgment. That finding was reinforced by the Upper Tribunal's analysis of the reasoning of the CJEU in *Gross*, as summarised at [37] to [38] above, and in particular its finding that it is the duty of national authorities to ensure that excise duty is levied and paid so as to prevent distortion of the internal market by goods in respect of which duties have not been paid circulating freely alongside goods where duty has been paid.

64. Therefore, there is no basis for Mr Jones's submission that the Upper Tribunal was engaging in an exercise of making policy itself under the guise of an exercise in purposive construction. It is plain that the Upper Tribunal carried out a proper exercise of purposive construction of the wording of the 2008 Directive itself informed by the manner in which it and its predecessor had been interpreted by the CJEU. In those circumstances, the concerns expressed by Lord Carnwath in *Buckinghamshire County Council* (as quoted at [52] above) do not arise; in that case it was apparent that the policy behind the relevant Directive was unclear whereas, as we have said, in this case there were sufficient tools available to the Upper Tribunal to ascertain the objectives of the 2008 Directive. Accordingly, the Upper Tribunal was right not to confine its analysis simply to the grammatical and ordinary sense of the words used in the 2008 Directive, as Mr Jones submitted it should have done.

65. We turn now to the dispute which is at the heart of this case, as it was in *B & M*, namely whether it is open to HMRC to assess a person who is found to be holding excise goods, in respect of which the holder cannot demonstrate that the duty has been paid, in circumstances where a prior event which would entitle HMRC to make an assessment on somebody else must have occurred, but where, when, how and by whom that event occurred cannot be established.

66. The reasoning of the Upper Tribunal in *B & M* that led it to the conclusion that an assessment on the holder of the goods could be made in those circumstances appears to us to have depended on the following three propositions:

(1) The policy behind the 2008 Directive is the need to ensure that unpaid excise duty is collected when goods have been released for consumption within the EU, the Upper Tribunal's conclusion on this issue being summarised at [149] and [155] of its decision;

(2) Consequently, Article 7 (2) (b) of the 2008 Directive and Regulation 6 (1) (b) which implements that provision, is intended to apply in circumstances where goods in respect of which excise duty has not been paid are being held but it has not been possible to establish an excise duty point at any earlier point in time, the Upper Tribunal's conclusion on this issue being summarised at [145] and [155] to [156] of its decision;

(3) It was very difficult to envisage circumstances where Regulation 6 (1) (b) could apply if it could not apply where goods can be said to have been released for consumption previously but the circumstances in which that release had occurred could not be established: see [143] of the Upper Tribunal's decision.

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.

68. In our view, that conclusion is supported by the CJEU judgments on which the Upper Tribunal relied on in *B & M*, in particular the *van de Water* case. Article 7(2)(b) of the Directive and regulation 6(1)(b) of the Regulations can readily be seen to give legislative effect to that decision.

69. In *van de Water* the relevant question was whether the mere holding of a product subject to excise duty could be regarded as a release for consumption, if and in so far as duty on the product had not already been levied. As the Upper Tribunal observed at [96] of its decision, at [28] and [34] to [36] of its judgment the CJEU referred to the fact that where a product subject to excise duty on which that duty has not been levied is held outside a duty suspension arrangement, it necessarily follows that the product must at some point have been manufactured or imported outside such an arrangement or have departed irregularly from such an arrangement. The court then referred to the necessity for the Member State concerned to determine how the duty is to be levied and in particular from whom it is to be claimed.

70. In our view the Upper Tribunal was right to say as it did at [104] of its decision, that *van de Water* offers strong support for the proposition that both the 1992 and the

2008 Directives envisage that a person who was found to be holding goods in respect of which excise duty has not been paid can be held liable for the duty in circumstances where it has not been possible to establish when, how, where or by whose agency an earlier release for consumption took place. The 1992 Directive did not include an equivalent of Article 7(2)(b) of the 2008 Directive: it defined "release for consumption" as meaning (in broad summary) any departure from or manufacture outside a duty suspension scheme and importation of products not placed under a suspension arrangement. Nevertheless, the CJEU concluded that Mr van de Water was rightly assessed on both the pure alcohol that he had acquired from elsewhere and the gin that he had made, even though in the case of the pure alcohol there must have been an earlier release for consumption.

71. We also agree with the Upper Tribunal's view that *BP Europa* was a further example of an excise duty point having been established in circumstances where the national customs authorities were unable to establish with certainty where the irregular departure from the duty suspension arrangement took place. In that case the circumstances were that there had been a short delivery of goods. In *BP Europa* the irregularity was deemed to have occurred at the time when the irregularity was detected.

72. As far as the third proposition is concerned, we challenged Mr Jones to provide examples of when Regulation 6 (1) (b) could apply in circumstances where none of the other three events detailed in that Regulation had occurred.

73. Mr Jones was unable to do so. His first example, given in his skeleton argument but not pursued orally, was where a registered consignee caused the goods to be delivered directly to its customer instead of the goods first going into its warehouse and being sent from that warehouse to its customer; in those circumstances Mr Jones submitted that the customer would be holding the goods and thereby liable to assessment. However, as Mr Beal submitted, the delivery to the customer would end the duty suspended arrangement, so the release for consumption would not be caused by the customer but by the registered consignor of the goods who would be liable to be assessed.

74. Mr Jones's second example was where goods were in transit under a duty suspended arrangement but were stolen in the course of transit. He submitted that in those circumstances the consignor had not caused the duty suspension arrangement to end, which as far as he and the consignee of the goods was concerned was still in place, with the result that the thief could be assessed on the basis that he was holding the goods. That argument must fail, however, because as a result of the theft the goods will have left the duty suspension arrangement and the excise duty point will thereupon have occurred with the result that the relevant guarantor will be assessed for the duty concerned.

75. We therefore conclude, as far as the third proposition is concerned, that the Upper Tribunal was right to conclude in *B & M* that it is very difficult to envisage the circumstances in which Regulation 6 (1) (b) could apply other than in circumstances where it had not been possible to establish the facts on which an earlier excise duty

point could be established. In common with the Upper Tribunal in *B & M*, our view is that the provision was introduced in the 2008 Directive for the purpose of putting the conclusions reached by the CJEU in *van de Water* on a statutory footing.

76. It follows that in our view the Upper Tribunal's reasoning in *B & M* on the central issue which fell for determination was sound. It follows that there is nothing in Mr Jones's submission that the use of the definite article in both the Directive and the Regulations is strongly indicative that only one duty point can arise in respect of any goods in any EU state. The reasoning in *B & M* does not support the conclusion that there can be more than one excise duty point in respect of the same goods. It supports the conclusion that there cannot be an excise duty point against which an assessment can be made until the facts by which it has occurred can be established. There can only be one assessment in respect of the same goods, but an assessment cannot be made except by reference to a clearly established excise duty point. HMRC do not contend that there can be more than one assessable excise duty point.

77. It also follows that Mr Jones's submissions as regards Article 38 of the Directive take the matter no further. In any event, that Article is of limited application; it only applies in circumstances where Article 33 applies, namely where goods already released for consumption in a member State are subsequently held in another member state for commercial purposes. The same applies to Mr Jones's submissions regarding Regulations 17 to 19, 80 and 84 of the Regulations; those provisions also only apply in the limited circumstances specified in those Regulations.

78. We now turn to the question of whether it could have been intended that a person found to be holding excise duty goods, in circumstances where he or she had no knowledge of the fact that the duty had not been paid and who bought those goods in good faith, believing that the duty had been paid, could nevertheless be assessed for the unpaid duty.

79. In this regard, Mr Beal accepted in argument that, as a matter of law and not merely as a matter of HMRC's discretion, HMRC was obliged to assess 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. In *B & M* the Upper Tribunal appeared to have proceeded on the basis that the question as to who should be assessed where there had been a series of circumstances which could have led to an assessment was purely a matter of HMRC's discretion, which could only be challenged through the medium of judicial review: see [150] to [153] of the decision.

80. We accept that the position is as accepted by Mr Beal. It is consistent with our analysis that the Directive requires an assessment to be made against the first established excise duty point. Accordingly, as regards the example of Mrs Smith given by Mr Jones in his submissions, were Mrs Smith able to satisfy HMRC that she acquired the goods in the manner in which she contended, then it would not be open to HMRC to assess Mrs Smith but they would have to proceed against the wholesaler from whom she purchased the goods, who in turn might provide evidence that established an earlier excise duty point. Therefore, if HMRC pursued Mrs Smith

rather than any other person who it was able to establish was a previous holder of the goods, or who caused any other prior event which gave rise to an excise duty point, then it would be open to Mrs Smith to challenge any assessment made by HMRC through an appeal to the FTT. That tribunal would have a full merits jurisdiction to consider Mrs Smith's appeal and to decide whether it accepted Mrs Smith's evidence that she had bought the goods in question from the wholesaler. If it did, the assessment against her would have to be discharged.

81. We therefore do not accept Mr Jones's submission that a person in Mrs Smith's position becomes a guarantor of the unpaid duty. We also reject Mr Jones's characterisation of an assessment made pursuant to Regulation 6 (1) (b) being one that has been made as a result of HMRC's failure to police the duty payment regime. Clearly, HMRC cannot be expected to prevent every failure to comply with the duty suspension regime. It could only do so if it checked every consignment of excise duty goods, with the result that there would be long queues at the entry ports and questions asked as to whether the free movement of goods in the internal market was being distorted.

82. Neither, in normal circumstances, would there be any question of a bailee for reward such as the Royal Mail being assessed as a result of it transporting excise goods in respect of which duty had not been paid. Whilst the Royal Mail may be in possession of the goods, it would not normally be the holder of them, the holder being the person who has control over the disposal of the goods: see on this point *HMRC v Perfect* [2017] UKUT 0476 and the cases cited therein.

83. We therefore reject Mr Jones's submission that as a result of the interpretation of Regulation 6 (1) (b) favoured in *B & M* the amount of a taxpayer's liability would be decided by an administrative body against constitutional principle. The 2008 Directive, and consequently the Regulations, provide a clear basis for identifying who should be liable to pay the necessary excise duty when an excise duty point has been or can be established.

84. Finally, we can deal with Mr Jones's submissions as regards A1P1 briefly. On the basis of our analysis, the purpose of the legislation is clearly the imposition of a liability to ensure that excise duty is levied on goods circulating in the European Union in clearly defined circumstances, including upon a person who is found to be holding excise duty goods in circumstances where a prior excise duty point cannot be established. For the reasons we have given, the imposition of this liability cannot be regarded as being a secondary liability or a liability akin to that of a guarantor and consequently cannot be properly characterised as an interference with the taxpayer's property rights or disproportionate.

85. We therefore conclude that *B & M* was correctly decided and we should follow it. In those circumstances, subject to the question of a reference to the CJEU which we deal with below, we must dismiss the appeal.

Reference to the CJEU

86. This case clearly involves a point of EU law and D & R has asked us to consider whether there are questions that should be referred to the CJEU. Whether a point of EU law should be referred to the CJEU depends on Article 267 of the Treaty on the Functioning of the European Union which provides:

> "Where such a question is raised before any…tribunal of a Member State, that ...tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

87. Thus the question is whether a decision on the point of EU law is "necessary" for our decision but we still have a discretion whether or not to refer. In the well-known case of *Ex parte Else* [1993] QB 534 the Court of Appeal held:

> "if the facts have been found and the Community Law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself….If the national court has any real doubt, it should ordinarily refer."

88. Furthermore, in the later case of *Littlewoods Organisation plc v CCE* [2001] EWCA Civ 1542 the Court of Appeal said:

> "…A measure of self-restraint is required on the part of the national courts, if the Court of Justice is not to become overwhelmed….
>
> …[a] development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this court to which national courts and tribunals can resort in resolving new questions of Community law. Experience has shown that, in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this court's case law. Experience has shown that the case-law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference…"

89. Following the hearing, Mr Jones submitted a draft of a number of questions to be referred to the CJEU. HMRC commented on the draft, but there remained some differences between the parties as to the text of questions to be referred.

90. In our view, if there was to be a reference it should be made on the basis of the issue identified at [64] above, namely whether on the true interpretation of Article 7 of the 2008 Directive there is a chargeable release for consumption in a Member State when a person is holding excise goods outside a duty suspension arrangement where excise duty has not been levied in circumstances where there must have been a prior release for consumption in the Member State but excise duty has not been levied because the charging authority cannot establish where, when, how and by whom that release for consumption occurred.

91. However, on the basis of the reasoning in *B & M*, which relies on its analysis of the relevant EU jurisprudence, we are satisfied that the relevant principles of EU law

are sufficiently clear from existing CJEU decisions and we have therefore been able to resolve the issues on this appeal with complete confidence. We have therefore decided not to refer any question to the CJEU.

Disposition

92. The appeal is dismissed.

MR JUSTICE FANCOURT **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 15 January 2019