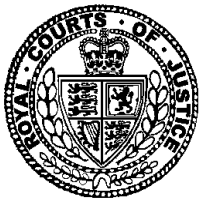

Neutral Citation Number: [2020] EWCA Civ 405

Case No: A3/2019/1274

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX & CHANCERY CHAMBER)
UTJ Jonathan Richards and UTJ Guy Brannan
[2019] UKUT 0004 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 March 2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE BAKER
and
MR JUSTICE MANN

- -

Between :

GENERAL TRANSPORT SERVICE SPA	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Arfan Khan and Joseph Howard (instructed by **Morrisons Solicitors LLP**) for the **Appellant**
Brendan McGurk and Daniel Sternberg (instructed by **the General Counsel and Solicitor to HMRC**) for the **Respondent**

Hearing dates: 19 and 20 February 2020

- -

Approved Judgment

LORD JUSTICE BAKER :

1. This is an appeal against a decision dated 27 January 2019 of the Upper Tribunal (Tax and Chancery Chamber) ("the UT") dismissing an appeal against a decision of the First-tier Tribunal ("the FTT") dated 3 November 2017. The UT itself granted permission to appeal on one ground, relating to the construction of Article 37 of Directive 2008/118/EC ("the Excise Duties Directive"). Permission to appeal on other grounds was refused by the UT and, subsequently, also refused by the single Lady Justice of this court.

Background

2. The appellant is an Italian company providing containers and logistic services across Europe. It contracts with customers to transport goods from the loading point to the destination but sub-contracts the transportation to third party hauliers.

3. On five occasions between December 2013 and February 2014, the UK Border Force at Purfleet seized a container owned by the appellant. On each occasion, the container was transporting goods on behalf of the same customer, a Romanian company called Giesse Bev Trade ("GBT"). The first container seized was manifested as containing wine but was not accompanied by a valid Administrative Reference Code ("ARC") required for the import of excise goods on a duty-suspended basis, nor had there been any prepayment of duty. The consignment documents for the four subsequent containers each stated that the container was carrying pallets of foodstuffs. In each case, the container was in fact carrying a substantial quantity of wine. None of the documents included an ARC code and no duty had been paid on any of the loads.

4. These proceedings concern only the fifth seizure, which took place on 19 February 2014. The consignment documents described the load as thirty pallets of foodstuffs, when in fact the container also contained wine on which duty had not been paid. According to the UT decision, the volume of wine seized on this occasion was over 168 hectolitres.

5. It is not disputed that in Italy the wine had been "released for consumption", within the meaning of that phrase in EU and UK law, and that, when it arrived in this country, it was not in the course of a duty suspended movement. The FTT heard and accepted evidence that, by the time of the first seizure, the second, third and fourth containers were already in transit. The tribunal found, however, that the appellant knew of the first four seizures before it accepted the order to transport the shipment that was subject to the fifth seizure. The FTT accepted that the appellant was unaware that the container was carrying excise goods but concluded that after being notified of the first seizure, had failed to check the location of the loading point and, had it done so, it would have discovered that it was a winery.

6. Border Force issued notices of seizure in respect of all five seizures to the appellant, and to other companies identified on the documents as the consignor, the consignee and the haulier. Save for the appellant, all correspondence was returned to Border Force unopened. No challenge was made to the legality of the seizures by the appellant or any other party and the wine was condemned as forfeit to the Crown by the passage of time under Schedule 3 to the Customs and Excise Management Act 1979 ("CEMA").

7. In the course of correspondence with the appellant, HMRC initially issued the appellant with an assessment to excise duty and a penalty in respect of the seized goods. After further correspondence, HMRC concluded that GBT should be assessed for the excise duty instead of the appellant and, on 13 February 2015, withdrew the assessment and penalty, whilst reserving their right to take further action against the appellant. On 23 October 2015, however, they informed the appellant that they intended to issue an "excise wrongdoing" penalty under paragraph 4(1) of Schedule 41 to the Finance Act 2008. Having concluded that the appellant's wrongdoing was not deliberate, HMRC applied a penalty percentage of 20% of the lost revenue, calculated at £45,000 and therefore, on 17 December 2015, issued a penalty assessment of £9,000.

8. On 28 April 2016, the decision was upheld after a review. On 26 May 2016, the appellant appealed against the penalty to the First-tier Tribunal, and, at the hearing, put forward the following arguments:

    (1) Article 37 of the Excise Duties Directive should be interpreted as meaning that, because the wine had been lawfully seized and destroyed by the UK Border Force in the course of its transport, no excise duty point ever arose on that wine and consequently the appellant could not be liable to a penalty.

    (2) The appellant was an innocent agent and so could not be liable for the penalty and had a reasonable excuse that provided it with a statutory defence to the penalty.

    (3) The penalty assessment was out of time.

9. The FTT rejected these arguments and dismissed the appeal. On the first ground, it concluded that an excise duty point was established when the goods, having been released for consumption in Italy, arrived in the UK and so were held for commercial purposes in this country. The subsequent destruction of the goods did not prevent the conditions for imposing a penalty being satisfied. On the second ground, the FTT rejected the argument that the appellant was an "innocent agent" and therefore could not be liable for a penalty. It concluded that there was no requirement for the company to know that it was arranging the transport of excise goods before a penalty could be imposed. Furthermore, the FTT found that the appellant had failed to establish a reasonable excuse because it had not performed any or any sufficient checks about the fifth consignment after receiving notice that the first container had been seized. On the third ground, the FTT decided, for reasons which it is unnecessary to set out here, that the penalty had been issued in time.

10. The appellant appealed to the UT, essentially on the same grounds as to the FTT. On 27 January 2019, the UT dismissed the appeal.

11. The appellant applied for permission to appeal to this court. The UT granted permission to appeal on the first ground, which was essentially in the same terms as the first ground of appeal to the FTT and UT but refused permission on the other grounds. In granting permission, the UT stated that the first ground had a real prospect of success and raised an important issue of principle The appellant applied to this court for permission on the other grounds. On 2 August 2019, that application was refused by Simler LJ. On 10 September, HMRC filed a respondent's notice inviting

this court to uphold the UT's decision for additional reasons. The appellant was granted permission to file a supplemental skeleton argument in response to the respondent's notice.

The Law

12. The Excise Duties Directive harmonises the principles to be applied across the EU concerning the point at which excise duty is levied on excise goods and the duty-suspended movement of goods between Member States. It replaced Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ("the 1992 Directive"). It is well established that case law interpreting the 1992 Directive can provide assistance in interpreting the corresponding provisions of the Excise Duties Directive.

13. The following provisions of the Directive are relevant to this appeal.

14. Recital (8) states:

> "Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise goods are released for consumption and who the person liable to pay the excise duty is."

Recital (9) provides:

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

15. Article 1(1) provides:

> "This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods
>
> (a) energy products and electricity …
>
> (b) alcohol and alcoholic beverages …
>
> (c) manufactured tobacco …."

16. Article 7 provides (inter alia):

> "(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.

….

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

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

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

17. Article 33 provides, so far as relevant to this appeal:

"(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."

18. Article 37(1) provides:

> "In the situations referred to in Article 33(1) … in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.
>
> The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected."

19. Article 38(1) provides:

> "Where an irregularity has occurred during a movement of excise goods under Article 33(1) or Article 36(1) [not relevant to this appeal] in a Member State other than the Member State in which they were released for consumption, they shall be subject to excise duty and excise duty shall be chargeable in the Member State where the irregularity occurred."

20. So far as relevant, these provisions have been implemented in UK law in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the HMDP Regulations"). Article 33 is implemented in regulation 13 which provides inter alia:

> "(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."

Article 37 is implemented in regulation 21 which, so far as relevant, provides:

> "(1) This regulation applies where
>
> (a) there is a relevant event that
>
> (i) occurs in the United Kingdom; or
>
> (ii) where it is not possible to determine where the event occurred, is detected in the United Kingdom, and
>
> (b) the occurrence of the relevant event is proven to the satisfaction of the Commissioners.

(2) A 'relevant event' means the total destruction or irretrievable loss of excise goods as a result of

(a) the nature of the goods;

(b) unforeseen circumstances;

(c) force majeure; or

(d) authorisation by the competent authorities of a Member State.

(3) If, at the time of the relevant event,

…

(b) the excise goods had already been released for consumption in another Member State, the occurrence of the event shall not give rise to an excise duty point under regulation 16(1) or 17(1).

(4) For the purposes of this regulation goods are considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods."

21. The provisions governing the imposition of penalties for failing to pay excise duty are found in paragraph 4(1) of Schedule 41 to the Finance Act 2008 which provides inter alia:

"A penalty is payable by a person (P) where

(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

A penalty can therefore only be imposed (a) in respect of goods which are "chargeable with a duty of excise", and (b) after an "excise duty point". Paragraph 4(2) of the Schedule provides that "excise duty point' has the meaning given by s.1 of the Finance (No.2) Act 1992 which empowered the Commissioners to make regulations fixing the time when the requirement to pay duty is to take effect. Under that power, regulation 5 of the HMDP Regulations provides that

"there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom"

and regulation 6(1) provides:

"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."

These provisions are in line with Article 7 of the Excise Duties Directive.

22. Paragraph 6 of Schedule 41 prescribes that the standard amount of a penalty shall be a percentage of the "potential lost revenue" depending on the circumstances. In cases of dealing with goods on which duty is outstanding, paragraph 10 defines "potential lost revenue" as "an amount equal to the amount of duty due on the goods." Paragraph 12 and 13 provide for a reduction of the penalty in cases where the person liable to the penalty discloses certain information.

23. The relevant provisions governing forfeiture of goods improperly imported are set out in s.49 of the Customs and Excise Management Act 1979 ("CEMA") and regulation 88 of the HMDP Regulations. The latter provision reads:

"If in relation to an 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."

S.170B of CEMA also makes provision for forfeiture of goods in respect of which an offence of taking preparatory steps for evasion of excise duty was committed.

24. Under Schedule 3 to CEMA, in order to challenge the legality of a seizure, a person is required to give notice of his claim to HMRC with one month of service of a notice of seizure. Under paragraph 5 of the schedule, if no notice is served, "the thing in question shall be deemed to have been duly condemned as forfeited".

The decisions of the First-Tier and Upper Tribunals

25. The FTT accepted the submission on behalf of HMRC, based on the decision of the Upper Tribunal in *HMRC v B & M Retail* [2016] UKUT 128 (TC), that HMRC were not precluded from issuing the penalty by the fact that there may have been an excise duty point prior to the appellant receiving the goods in question. The FTT held that the goods were clearly held for a commercial purpose in the UK, and further (at paragraph 144 of its decision)

"Therefore, in accordance with Article 33 (and UK implementing legislation) we find that the goods were subject to and became chargeable to excise duty in the United Kingdom when held in the United Kingdom. The goods were not

destroyed until after this excise point had arisen, and so the United Kingdom was not precluded from raising an assessment to excise duty and, accordingly, was not precluded from raising the penalty assessment."

26. Before the UT the appellant's argument on ground 1 was, in summary, as follows:

(1) The wine was totally destroyed as a consequence of the authorisation by the UK competent authorities.

(2) The destruction took place "during the transport" of the wine because the "transport" continued up until the point at which it could be duly delivered to its intended destination.

(3) The conditions in Article 37 were therefore satisfied.

(4) Article 37 did not simply provide that no excise duty point could arise after destruction of the wine, but also had the effect that, once the wine was destroyed, any duty point that might previously have arisen became void as if it had never had occurred or, alternatively, that there was never any duty point.

(5) Accordingly, the appellant cannot have engaged in the conduct set out in Schedule 41 paragraph 4 "after the excise duty point" so the basic condition for charging a penalty was not met.

(6) Alternatively, since Article 37 prevented the goods being chargeable to excise duty, the "potential lost revenue" was nil and, therefore, the amount of penalty, which was fixed as a proportion of potential lost revenue, could only ever be nil.

27. In response, HMRC argued that the decision was correct for the reasons given by the FTT. In addition, it argued that the appellant was precluded from arguing that no excise duty point had arisen by a line of authorities starting with the decision of this court in ***HMRC v Jones and Another*** [2011] EWCA Civ 824. In that case, tobacco and the taxpayers' car in which it had been transported were seized by HMRC. The taxpayers did not challenge the seizure in the magistrates' court and therefore, under the relevant statutory provision, the tobacco and car were "deemed to have been duly condemned and forfeited". Subsequently, the taxpayers asked for the car back on the grounds that the tobacco had been for personal use. The proceedings reached this court which had to determine whether it was open to the taxpayers to pursue this argument having decided not to challenge the seizure. It was held that the deemed effect of the taxpayers' failure to contest condemnation of the goods was that the goods were being illegally imported by them for commercial use. At paragraph 71(7), Mummery LJ observed:

> "… The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to 'reality'; it is a commonly used and legitimate device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion."

In *European Brand Trading Ltd. v HMRC* [2016] EWCA Civ 90, an excise duty appeal, Lewison LJ, having referred to Mummery LJ's observation in *Jones*, said (at paragraphs 34-5):

> "34. … Mummery LJ was doing no more than giving effect to the deeming provision in accordance with well-established principles. To take one well-known example, in *East End Dwellings Co. Ltd. v Finsbury BC* [1952] AC 109, 132, Lord Asquith said:
>
> > 'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.'
>
> 35. It is a necessary corollary of a condemnation (whether actual or deemed) that the excise duty has not been paid."

It was submitted on behalf of HMRC before the UT that it was a necessary corollary of the deemed condemnation in this case that excise duty had not been paid and therefore that duty had been chargeable and that an excise duty point had arisen.

28. In reply, counsel for the appellant submitted that, notwithstanding Lewison LJ's observation, his argument that no excise duty was due was consistent with the wine being lawfully seized. Counsel accepted that, since no challenge had been brought in the magistrates' court, the statutory provisions deemed the wine to have been lawfully seized and that, in principle, certain other "deemed facts" followed on. He argued, however, that on the facts of this case it was not a "deemed fact" that the goods were chargeable with excise duty or that an excise duty point arose. The terms of Regulation 88 of the HMDP Regulations and s.49 of CEMA rendered the seizure lawful even if the goods were not subject to duty and no excise duty point ever arose.

29. The UT dealt first with latter argument. It rejected HMRC's submission, based on *Jones*, that it was a necessary corollary of the deemed condemnation that the wine had been chargeable to excise duty and an excise duty point had arisen. At paragraph 19, it observed:

> "In many cases, it must follow from the fact that goods are lawfully seized that excise duty was due on them but was not paid. However, that will not always be the case. For example, the UK authorities are permitted to seize unauthorised shipments of ivory, but there is no question of ivory being subject to excise duty."

30. The UT noted that in the notice of seizure the Border Force officers had stated that they had seized the wine as liable to forfeiture by force of regulation 88 of HMDP and s.170B of CEMA. The UT therefore identified the "deemed facts" arising in this case as being (1) that the goods seized were wine, a category that is in principle subject to excise duty, and (2) the requirements of regulation 88 of HMDP and/or s.170B of CEMA were met so as to make that seizure lawful. As no condemnation proceedings had been brought in the magistrates' court, the UT saw no reason to establish the scope of the "deemed facts" consequent on the absence of such proceedings. In supplemental submissions filed at the tribunal's request following the hearing, counsel for HMRC accepted that goods could be lawfully seized under regulation 88

and s.170B even if no charge to excise duty had arisen. The UT described this submission as a "concession" and concluded that HMRC were not arguing that, in the specific circumstances of this appeal, the existence of a duty point was a precondition to lawful seizure of the wine. It followed in the UT's view that the appellant's argument that there was no such duty point could not be inconsistent with the deemed facts. The UT was reinforced in this conclusion by what it described as the "harshness" of the consequence for the appellant if it was precluded from arguing that the goods were not chargeable with excise duty because

> "if there had been a challenge to the legality of the seizure, there would be an obvious difficulty in arguing that Article 37 … prevented a duty point arising and so prevented the goods from being lawfully seized since the wine would not have been destroyed by the time of the condemnation proceedings."

31. The UT then considered the appellant's arguments on the construction of Article 37.

> "61. We do not accept Mr Sternberg's submission [for HMRC] that Article 37 does not apply where there has been a prior duty point established under Regulation 13 of the HMDP Regulations (that implements Article 33). We therefore respectfully consider that the FTT was in error at [144] of the Decision. Article 37 is expressed to apply 'in the situations referred to in Article 33(1)'. Therefore, Article 37 applies where Article 33 would otherwise apply and sets out exceptions to the chargeability of excise duty established in Article 33. It is therefore not correct to say that the prior application of Article 33 prevents Article 37 from applying.
>
> 62. As we have noted, the FTT did not make a finding as to precisely when the wine was 'irretrievably lost' or destroyed. It cannot have been 'irretrievably lost' until, at the earliest, one month after it was seized since that was when the deadline for challenging the legality of the seizure expired …. It is reasonable to infer that the wine was not destroyed until after that point. Therefore, by the time of 'irretrievable loss' or destruction, having been seized, the wine was no longer being 'transported' anywhere, at least in the ordinary sense of that word ….
>
> 63. Mr Thornton [for the appellant], however, argued that 'transport' should not be given an ordinary colloquial meaning in Article 37 of the Excise Duties Directive. Rather, he argued that a 'transport' of goods in Article 37 should be regarded as synonymous with a 'movement' of goods in Article 38. Moreover, he submitted that the definition of an 'irregularity' in Article 38 demonstrated that a 'movement' of goods (and so a 'transport' of goods) was in progress right up until the point at which it could be duly ended. Up until the very point at which the wine was destroyed or irretrievably lost, there was still the possibility that it might be restored and continue to its destination with the result that, in Mr Thornton's submission, the destruction or irretrievable loss of the wine took place 'during [its] transport'.
>
> 64. Despite the ingenuity of this submission, we reject it. Article 38 of the Excise Duties Directive is concerned with 'irregularities' in cross-border movements of excise goods. In those circumstances, it is natural for Article 38 to consider whether movements of goods have ended 'duly' or not. However, Article 37 is concerned with the natural hazards of the transportation of goods: for example

bottles may be broken in transit and their contents lost or goods may be stolen. Given the risks with which Article 37 is concerned, we consider that the term 'transport' should be given its ordinary and natural meaning and not the legalistic meaning for which Mr Thornton argues. Moreover, the obvious difficulty with Mr Thornton's argument is that Article 37 does not use the concept of a 'movement' that appears in Article 38 which points against the conclusion that 'transport' and 'movement' are synonymous concepts. We therefore consider … that Article 37 does not apply.

65. There is a further reason why Article 37 does not apply. The Company is relying on the condition … that the destruction of the wine took place 'as a consequence of the authorisation of the [UK Border Force]' because, in seizing and destroying the wine, the Border Force was acting within the scope of its authority. However, we consider that this involves a misreading of Article 37.

66. Article 37 deals with two situations. (1) In the first situation, there will be a 'total destruction' or 'irretrievable loss' …. In that case, as of right, the goods are not chargeable with excise duty (provided the proof required by Article 37 is given). No permission of the authorities is required for this aspect of Article 37 to apply. (2) However, Article 37 recognises that there may be other situations, connected with the natural hazards of the transport of goods, in which a taxpayer may want the authorities to agree that, provided goods are destroyed, no excise duty will be chargeable. Article 37 therefore gives flexibility to authorities and taxpayers to agree such arrangements on a case by case basis.

67. The 'authorisation of the competent authorities' referred to in Article 37 is a reference to the second situation set out at [66(2)]. Like the first situation (set out at [66(1)]), this is concerned with the natural hazards of transportation of goods. So, for example, excise goods might be so badly damaged during transport that, while they could technically still be used as excise goods, they are unsaleable in practical terms. Even though such goods would not be 'totally destroyed' or 'irretrievably lost' (and so the first situation is not applicable), the competent authorities are allowed to permit the goods to be destroyed on terms that no excise duty is payable. We see no justification for the broad reading of Article 37 which Mr Thornton advanced under which any lawful destruction of goods by a Member State's competent authorities prevents excise duty being chargeable. In particular, since Article 37 is concerned with the natural hazards of transporting goods, we see no reason why it should be read as giving rise to the extraordinary result that smuggled goods cease to be chargeable with excise duty simply because the vigilance of the competent authorities results in the smuggling attempt being foiled and the goods seized and destroyed.

68. In arguing that Article 37 applies, Mr Thornton drew attention to the central importance of 'consumption' in the Excise Duties Directive. He argued, referring to recital (9) of the Excise Duties Directive, that all provisions relating to the chargeability and liability of excise duty relate to goods that may still be consumed and referred to the decision of the CJEU in *Polihim* (Case C-355/14) in this regard. We agree that 'consumption' is a central concept in EU law relating to excise duty….

69. However, Recital (9) of the Excise Duties Directive clearly does not establish that in all cases in which goods are destroyed or irretrievably lost, excise duty should not be charged. Moreover, the Excise Duties Directive cannot be intended to produce distortions in the single market. If the Company's interpretation of Article 37 is correct, the consequence would be that, if the UK authorities seize and destroy

> smuggled intra-EU goods, they would lose any right to assess those involved in the smuggling. Such an interpretation might mean that those involved in smuggling face a limited 'downside'. That might serve to increase distortions in the single market with economic operators in Member States that levy comparatively low rates of excise duty having an incentive to try to smuggle excise goods into the UK.
>
> 70. Therefore, we consider that the short answer to Mr Thornton's point on 'consumption' is that this is one of the situations in which destruction or irretrievable loss of the excise goods does not prevent a charge to duty from arising.
>
> 71. For all those reasons, we do not consider that Article 37 of the Excise Duties Directive applies in the circumstances of this appeal so as to prevent a duty point arising on the wine."

Submissions to this court

32. On behalf of the appellant, it was submitted that the UT's decision was wrong for several reasons.

33. First, it was submitted that the decision is contrary to the fundamental principle that taxes and duties can only be imposed by clear words: *W.T Ramsay Ltd v IRC* [1982] AC 300.

34. Secondly, it was asserted that the decision is contrary to established EU case law which has proceeded on the basis that "transport of goods" was concerned with the movement of goods: see *Prankl v Zollamt Wien* (2015) C-175/14.

35. Third, it was submitted that the UT was wrong to apply an ordinary construction to the word "transport". As a word used in the Directive, it ought to be construed "legally". A "legal" construction should lead to the conclusion that the word is not just intended to deal with destruction arising out of natural hazards. Transport of the goods continued until the wine was destroyed. Up to that point, there was a possibility that it might be restored and continue to its destination. Such an interpretation is consistent with the CJEU decision in *Prankl*.

36. Fourth, the UT's observation that it would be an extraordinary result that smuggled goods cease to be chargeable with excise duty simply because the smuggling is foiled by the vigilance of the authorities fails to take into account the fact that this is the effect of Article 37 on the facts of the case. It also fails to appreciate the array of measures which each Member State may impose instead of seizure and forfeiture to deter such actions.

37. Fifth, it was submitted that the issue of whether or not the destruction of the goods took place during "transport" within the meaning of Article 37 required a finding of fact. Having accepted that the FTT did not make any findings as to when the wine was irretrievably lost or destroyed, it was not open to the UT to infer by speculation that the wine was destroyed when the legality of the seizure expired.

38. Sixthly, it was argued that Article 37 should be construed consistently with the case law under the 1992 Directive and in particular the decision of the CJEU in *Dansk v Skatteministeriet* C-230/08, [2010] STC 1711 in which it was stated (at paragraph 86) that the provisions of the earlier directive

> "must be interpreted as meaning that goods seized by the local customs and tax authorities on their introduction into the territory of the Community and simultaneously or subsequently destroyed by those authorities, without having left their possession, must be regarded as not having been imported into the Community, with the result that the chargeable event for excise duty on them does not occur."

39. The overarching point advanced on behalf of the appellant was that excise duty is a tax on consumption so that, where goods are destroyed before consumption, no liability to duty arises.

40. On behalf of HMRC, it was submitted that the goods in issue were undoubtedly chargeable for excise duty in the UK pursuant to Article 33. In addition, by its respondent's notice, it sought to uphold the UT's decision by reference to the decision in *Jones*, contending that, as there was no challenge to the lawfulness of the seizure in condemnation proceedings, the appellant is not now able to contend that no duty point had arisen at the time of seizure. Finally, it was contended that Article 37 cannot in any event operate to prevent excise duty being chargeable in this case.

41. On the Article 33 point, Mr McGurk relied on the findings of the FTT that the wine had been released for consumption in Italy and, upon arrival in the UK, was held for commercial purposes in this country. As a result, it became chargeable to excise duty at that point. He submitted that the FTT had been right to conclude, relying on *HMRC v B & M Retail* [2016] UKUT 128 (TC), that HMRC were not precluded from issuing the penalty by the fact that there may have been an excise duty point prior to the appellant receiving the goods in question.

42. As to *Jones*, Mr McGurk reiterated the argument relied on by HMRC before the UT. As a result of the failure to initiate condemnation proceedings, the wine was deemed to have been duly condemned as forfeited. Deeming this to be the case carries with it the fact that excise duty has not been paid. A corollary of the fact that excise duty has not been paid is that excise duty was chargeable and excise duty could only be payable if an excise duty point had arisen. He submitted that the UT had been wrong to conclude otherwise and had gone astray in its analogy with ivory. The present case is dealing not with non-excisable goods (such as ivory) but with excisable goods. The wine was seized because it was excise goods which had been held for a commercial purpose but in respect of which no duty had been paid. It was therefore submitted that a failure to challenge the seizure does not merely deem the seizure to be lawful. In the context of a seizure of excise goods, if, as Lewison LJ held in *European Brand Trading*, a corollary of the deeming provision is that the excise duty has not been paid, it is inconsistent with that "fact" that the goods were not liable to excise duty because no excise point had been reached. It was submitted that the fact that the notice of seizure referred to regulation 88 did not assist the appellant because forfeiture under that regulation can only arise in respect of "any excise goods that are liable to duty that has not been paid".

43. Mr McGurk submitted that the UT had been wrong to conclude that because HMRC's written submissions did not argue that the existence of a duty point is a precondition to lawful seizure of the wine under regulation 88 that it was conceding that it was not. He further submitted that the UT had wrongly concluded that it would be "harsh" to deny the appellant the opportunity to contend that no excise duty point had arisen

since by doing so it would be precluded from relying on Article 37. It is not a precondition of Article 37 that no excise duty point has arisen. The fact that, as HMRC contends, the appellant was barred by the principles in *Jones* from contending that excise goods cannot be deemed to have reached a duty point does not mean that Article 37, if applicable, might not operate to prevent the duty being recovered.

44. In this case, however, Mr McGurk submitted that the UT had correctly concluded that Article 37 did not operate to prevent the duty being chargeable. He submitted that the UT had been entitled to conclude that the wine had not been destroyed until after the deadline for challenging the seizure and that by that stage it was no longer being transported. He further submitted that the UT was entitled to conclude that destruction through forfeiture is not as a consequence of authorisation by the competent authorities in the sense intended by Article 37. He cited a decision of the FTT in *Staniszewski v HMRC* [2016] UKFTT 128 in which it had been observed that the contrary argument

> "would lead to excise goods being seized and forfeited because they were liable to unpaid excise duty ceasing to be liable to that duty by reason of their seizure and forfeiture and, in the absence of liability to excise duty, the goods would no longer be liable to seizure and forfeiture. If this were the case it would lead to the absurd position that goods could never be seized and subject to forfeiture as the very act of seizure and forfeiture would render the goods not liable to seizure or forfeiture in the first place."

Mr McGurk submitted that there was nothing in the wording of Article 37 or the case law to suggest that destruction cannot occur after a duty point at which excise duty is chargeable which gives rise to a penalty. If the appellant's construction was correct, it would incentivise smuggling since it would operate to prevent a duty point arising.

45. Finally, Mr McGurk submitted that the CJEU decision in *Dansk* is not relevant as the terms of Article 37 are materially different from those of the previous directives.

46. In a supplemental skeleton argument on the "deemed duty" point, the appellant made four contentions. First, it submitted that HMRC is precluded from going behind the concession identified by the UT in its decision. The appellant cited the statement made in HMRC's written submissions to the UT:

> " … for goods to be liable to forfeiture under regulation 88 the language of the regulation does not require a finding of a duty point …. [The] respondent does not agree that excise goods on which a duty point has not arisen cannot be forfeited under regulation 88 specifically."

The appellant submitted that the UT rightly characterised this as a concession and concluded that they, in the specific circumstances of this case, were not arguing that the existence of a duty point was a precondition for lawful seizure of the wine. As a result, HMRC irrevocably waived reliance on a jurisdictional challenge based on the deemed statutory provisions. The appellant further submitted that HMRC should not be permitted to resile from the concession, having regard to the principles relating to a proposed withdrawal of a concession identified by Mann J in *BT Pensions Scheme Trustees v British Telecommunications PLC, Secretary of State for Business Innovation and Skills* [2011] EWHC 2071.

47. Secondly, in any event HMRC is barred from pursuing the deemed duty argument before this court because it is estopped from doing so. The appellant asserted that there was a mutual understanding between the parties arising from the concession that the lawful seizure of goods did not create a deemed duty point. Furthermore, it would be an abuse of process to permit HMRC to argue the deemed duty point having failed to take it before the UT.

48. Thirdly, on a correct analysis of the authorities cited by HMRC, which are distinguishable, there is no deemed duty point that arises through the lawful seizure of goods. Fourthly, if the deemed duty provisions apply to bar the tribunal's jurisdiction, they should be set aside in order to give effect to Article 37 of the Directive and Article 47 of the EU Charter and/or declared incompatible with Article 6 of ECHR.

Discussion

49. In my judgment, this appeal can be resolved by a straightforward construction of Articles 33 and 37 of the Excise Duties Directive.

50. As Mr Khan and Mr Howard on behalf of the appellant accepted in the course of the hearing before us, unless Article 37 subsequently disapplied its effect, there can be no doubt that the provisions of Article 33 were satisfied. The wine in the fifth container had been "released for consumption" in Italy. At the point of arrival at Purfleet, it was being "held for commercial purposes … in order to be delivered here". Accordingly, it was subject to excise duty here and excise duty became chargeable here. At that point, under regulations 5 and 6 of the HMDP Regulations, an "excise duty point" arose and the appellant, being a person "concerned in carrying … the goods", became liable to a penalty under paragraph 4 of schedule 41 to the Finance Act 2008.

51. Did Article 37 apply so as to prevent excise duty being chargeable on the wine? In my judgment, it did not, for the reasons identified by the UT at paragraphs 61 to 71 of its decision. None of the arguments put forward on behalf of the appellant persuades me that the FTT and UT were wrong.

52. In the context of this appeal, the construction of Article 37 turns on two phrases: (1) "during their transport in a Member State" and (2) "as a consequence of authorisation by the competent authorities of that Member State".

53. I agree with the UT that "transport" should be given its ordinary meaning. For my part, I derive no assistance by comparing and contrasting the use of the word "movement" in Article 38. The wine in the appellant's container was being transported from the ship to its ultimate destination in the UK. Had it continued on its journey, it would have been "transported" until it reached its destination. But it did not continue on its journey. It was seized by Border Force and held by that agency until it was destroyed following forfeiture. At the time of its destruction, it was not being "transported".

54. As for the second phrase, I do not accept the submission that the ultimate destruction of the wine by or on behalf of Border Force following forfeiture falls within the scope of the phrase "as a consequence of authorisation by the competent authorities". The destruction of the wine following forfeiture took place on the orders of Border Force. The word "authorisation" means the granting of official permission. The plain and

obvious purpose of including that phrase in Article 37 is to cover the destruction of goods which are partially, but not totally, destroyed in transit. Article 7(4) provides that, for the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods. But there will be other cases where the goods are substantially damaged while being transported but have not become totally unusable (for example, where a proportion of a consignment of wine bottles are broken but the remainder are intact). Article 37 allows for circumstances where the competent authorities may formally agree to the destruction of the remainder so as to remove them from the scope of the duty.

55. None of the arguments advanced by the appellant to counteract this construction has any merit.

56. With regard to the first argument, it is of course correct that it is a fundamental principle that taxes and duties can only be imposed by clear words. In this case, however, the words of Article 37 are clear and straightforward.

57. As for the second and third arguments, I do not consider the decision of the CJEU in ***Prankl*** to be relevant to the construction of Article 37. That case concerned the earlier 1992 Directive. The CJEU decided that that directive

> "must be interpreted as meaning that, where the goods subject to excise duty that have been smuggled into the territory of a Member State are transported, without the accompanying document prescribed in … that directive, to another Member State, in the territory of which those goods are discovered by the competent authorities, the transit Member States are not permitted also to levy excise duty on the driver of the heavy goods vehicle who transported them for having held those goods for commercial purposes in their territory."

The circumstances in ***Prankl***, which concerned goods that were smuggled into the EU, were plainly completely different to those of the present case. In any event, a reading of the judgment satisfies me that the CJEU was using the words "transport" and "transit" in their ordinary meaning.

58. With regard to the fourth argument, I endorse the UT's observation at paragraph 69 of its decision as to the consequences if smuggled goods were to cease to be chargeable to excise duty, or cease to attract any consequential penalty, once they were seized, forfeited and destroyed. The interpretation suggested by the appellant leads to the absurd outcome identified by the FTT in ***Staniszewski***.

59. There is nothing in the appellant's fifth point about the need for a finding of fact. The essential facts as agreed were that the wine was seized and, after the expiry of the time for challenging the seizure in the magistrates' court, was forfeited and destroyed.

60. With regard to the sixth point, whilst it is clear that earlier case law may be cited when construing EU legislation, it does not follow that clearly-worded provisions in an EU Directive have to be interpreted in line with earlier case law which was concerned with a different instrument. Article 37 was a new provision. There was no equivalent in the earlier directive. In the circumstances, cases about the construction of the earlier Directive such as ***Dansk***, (which was in any event concerned with goods

smuggled into the EU) do not in my view provide any assistance when construing the new Article 37.

61. Finally, while I accept that excise duty is a tax on consumption, it does not follow that it is only payable when goods are consumed. Article 33 of the Excise Duties Directive is crystal clear about when goods become chargeable to duty. There is to my mind nothing unfair about an outcome in which goods are liable to forfeiture in circumstances where a liability for duty and a penalty also arise. As the Upper Tribunal observed in *Kevan Denley v HMRC* [2017] UKUT 340 (TC) at paragraph 74, these are all consequences prescribed by law.

62. I would therefore dismiss the appeal on the basis that the UT's construction of Article 37 was plainly correct.

63. In those circumstances, unless my Lords disagree, I would be reluctant to embark on a lengthy analysis of HMRC's alternative argument raised in its respondent's notice based on its interpretation of the decision in *Jones*. I take that view for three reasons. First, as I have just concluded, I consider the UT's decision as to the construction of Article 37 was correct. On behalf of the appellant, Mr Khan in effect accepted at the outset of the hearing before us that, subject to its being subsequently removed by Article 37, an excise duty point arose under Article 33, and it must have persisted. The two factors which HMRC are seeking to have "deemed" from the failure of the appellant to contest the condemnation of the wine – that excise duty was chargeable and an excise duty point had arisen – are therefore conceded by the appellant. The "deemed duty" point is therefore of academic interest only in this appeal.

64. Secondly, it is clear from the UT's judgment that their approach to this question was significantly influenced by what they regarded as a "concession" made by HMRC in its supplemental written submissions. We were taken to those supplemental submissions by counsel and addressed on this issue at some length. Mr McGurk sought to persuade us that it was not in fact a concession at all and that, if it was, he should be entitled to resile from it. Mr Khan (who did not appear in the substantive appeal hearing below) insisted that it was a concession and to allow HMRC to resile from it would be wrong in principle. For my part, I think the UT may have been misled into thinking that HMRC's submission included a concession. But that is what they did and this interpretation plainly narrowed the scope of their analysis of the deemed duty issue. With hindsight, it was probably a mistake to allow this issue, which is by no means straightforward, to be canvassed purely in supplemental written submissions, rather than with the benefit of full argument.

65. The third reason for my reluctance to venture further into this issue is that we have not had sufficiently comprehensive submissions on the point. I mean no disrespect to counsel in making that observation. For various reasons, including the matters mentioned above, the full ramifications of HMRC's argument were not explored at the hearing before us. It is plain, however, that any decision of this court on the point, or any expansive dicta on the subject, could have consequences for other areas of tax law. In those circumstances, it seems prudent to refrain from comment.

66. In the light of what we have heard, however, I do feel able to say, with due respect to the UT, that we have heard sufficient argument to conclude that the UT's comments on the interpretation and application of *Jones* in this context, in particular at

paragraphs 50 to 57 of the decision, should not be regarded as authoritative. Just as we did not receive sufficient argument on this complex issue, I am confident that the argument before the UT, made largely in the supplemental written submissions without oral argument, was insufficient to enable the UT to reach a conclusive view. Accordingly, the UT's decision on this aspect of the case should not be regarded as authoritative without further argument in an appropriate case.

67. For the reasons given above, I would dismiss the appeal.

MR JUSTICE MANN

68. I agree.

LORD JUSTICE PATTEN

69. I also agree.