TC02055

Appeal numbers: EDN/08/8009, 8010, 8012, 8013 and 8014

EXCISE DUTY – disappearance of goods; excise duty point; tax warehouse; assessment on consignor; carrier and owner of goods; validity of assessments; joint and several liability; abnormal and unforeseeable circumstances; force majeure; whether supervening principles of European Law of proportionality and/or legal certainty rendered assessments invalid; Council Directive 92/12/EEC, Arts. 13, 14, 15 & 20; validity of Regulation 7 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001

FIRST-TIER TRIBUNAL
TAX CHAMBER

BUTLERS SHIP STORES LTD, DIRECT PLUS DISTRIBUTION LTD & ROY McKILLOP — **Appellants**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC, FCIArb.
Dr HEIDI POON CA, CTA, PhD.

Sitting in public at George House, Edinburgh on 27 and 28 February 2012

Julian Ghosh, QC and Philip Simpson, advocate, instructed by Paull & Williamsons, solicitors, Edinburgh (and Aegis Tax LLP, London) for the Butlers Ship Stores Ltd

No appearance for Direct Plus Distribution Ltd

Roy McKillop in person (part of hearing only)
Derek Francis, advocate, instructed by the Office of the Advocate General for the Respondents

DECISION

Introduction

1. These appeals relate to the disappearance of consignments of whisky and vodka despatched from a tax warehouse operated by the first-named Appellant, Butlers Ship Stores Ltd ("Butlers") on several dates in 2007. The goods did not reach their destination (Tallinn, Estonia, and Cadiz). The Respondents ("HMRC") raised assessments under reference to the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001, SI No. 3022 (the "2001 Regulations") against Butlers, as consignors, the second-named Appellant, Direct Plus Distribution Ltd ("Direct Plus") as the owner of the goods, and the third-named Appellant, Roy McKillop, ("McKillop") as the transporter of the goods.

2. The main issues in these appeals which challenge the validity of certain assessments made consequent upon the disappearance of the excise goods, concern (i) the principle or doctrine of *force majeure*, and (ii) certain principles of European Law, and their applicability and effect on the validity of Regulation 7(1) of the 2001 Regulations.

3. A Hearing took place at Edinburgh on 27 and 28 February 2012. Julian Ghosh QC and Philip Simpson, advocate appeared on behalf of Butlers on the instructions of Paull & Williamsons, solicitors, Edinburgh, and Aegis Tax LLP, 2 Stone Buildings, Lincoln's Inn, London. Mr Ghosh led the evidence of Douglas Butler, the principal shareholder and a director of Butlers; Harry Hanton, a shareholder and a director of Butlers; and Alan Powell, an independent specialist, excise duty consultant. HMRC were represented by Derek Francis, advocate, instructed by the Office of the Advocate General. He produced the written evidence of Alexander Stobie a Higher Assurance HMRC Officer and Craig Clark a Higher Compliance Officer, also with HMRC. Their written evidence was agreed; they did not give oral testimony.

4. Witness Statements of Butlers' witnesses were exchanged and lodged in advance of the Hearing. A Joint Bundle of productions (four lever arch files) was also produced together with an additional file of productions produced by HMRC. Skeleton arguments were submitted on behalf of Butlers and HMRC. A Statement of Agreed Facts as between Butlers only and HMRC was also produced.

5. Direct Plus were neither present nor represented at the Hearing. Their professional advisers withdrew at an earlier stage. Mr McKillop attended part of the Hearing. He conducted his own appeal. His professional advisers also withdrew at an earlier stage. Mr McKillop gave evidence at the outset of the Hearing (with the agreement of Butlers, HMRC and the Tribunal), and then departed.

Legal Framework

6. The legal framework which we describe in this section, unless otherwise noted, was in place in 2007 and is applicable to the events giving rise to the appeals.

7. Council Directive 92/12/EEC relates to the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products. The Directive applies to alcohol and alcoholic beverages (Art. 3). Art. 4 defines *inter alia authorised warehousekeeper, tax warehouse, suspension arrangement and registered trader.* Art. 6.1 provides that excise duty becomes chargeable when the products in question are released for consumption. Release for consumption means *inter alia* any departure, including an irregular departure, from a suspension arrangement. Movement of products between the territories of the various Member States is to be under cover of an accompanying document (Arts. 7, 18 and 24). Art. 13 requires an authorised warehousekeeper to provide a guarantee, if necessary, to cover production, processing and holding and a compulsory guarantee to cover movement. The conditions are to be laid down by the tax authorities of the Member States.

8. Art. 14, which forms the foundation of part of Butlers' appeal, is in the following terms:-

> 1 Authorized warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or *force majeure* and established by the authorised (*sic*) of the Member States concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the traders referred to in Art. 16 during the transport of products under excise duty suspension arrangements.
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> 2 Losses referred to in paragraph 1 occurring during the intra-Community transport of products under excise duty suspension arrangements must be established according to the rules of the Member State of destination.
>
> 3 Without prejudice to Art. 20, the duty on shortages other than the losses referred to in paragraph 1 and losses for which the exemptions referred to in paragraph 1 are not granted shall be levied on the basis of the rates applicable in the member States concerned at the time the losses, duly established by the competent authorities, occurred, or if necessary at the time the shortage was recorded.

9. Butlers argue that Art. 14 has not been transposed into the domestic law of the United Kingdom and therefore has direct effect.

10. Art. 15, in broad terms, provides that the movement of products subject to excise duty under suspension arrangements must take place between tax warehouses. Art. 15.3 provides that the risks inherent in intra-Community movement are to be covered by the guarantee provided by the authorised warehousekeeper of dispatch. Provision is also made for a guarantee, jointly and severally binding both consignor and transporter, and where appropriate the Member States (not the warehousekeeper) may require the consignee to provide a guarantee. The detailed rules for the guarantee are to be laid down by the Member States. Art. 20.1 imposes liability for excise duty on the guarantor where there has been an irregularity in the course of a movement. Art. 20.4 provides that where products do not arrive at their destination and it is not possible to determine where the irregularity was committed, it is deemed

to have been committed in the Member State of departure unless within four months the place where the irregularity occurred is actually determined.

11. Section 1 of the Finance (No 2) Act 1992 paved the way for making regulations fixing the time when excise duty became payable in the light of the introduction of the Single Market and the abolition of fiscal frontiers throughout the European Union. It was intended to enable the United Kingdom to give effect to the 1992 Directive. The Excise Goods (Holding, Movement, Warehousing and REDS[1]) Regulations 1992 SI No 3135, enabled the free movement of excise goods with no customs formalities at frontiers and established related systems and procedures to facilitate trade. The Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 SI No 3022 identified excise duty points in relation to Community excise goods in various circumstances, and identified the persons liable to pay the excise duty when an irregularity occurred during the course of an intra-EU movement of duty suspended excise goods. Liability to pay excise duty is suspended where the goods are moved from one tax (colloquially *bonded*) warehouse to another subject to various prescribed conditions including the use of a form known as an accompanying administrative document or "AAD".

12. Regulation 4 of the 2001 Regulations applies where there is a duty suspended movement, which has not been discharged by the arrival of the goods at their destination within four months, where there has been no excise duty point prescribed by regulation 3, and there has been an irregularity (within the meaning of Art. 20 of Council Directive 92/12/EEC). In those circumstances, Regulation 4 provides that the excise duty point is to be the time when the goods were removed from the tax warehouse in the United Kingdom. Here, that means the dates when the goods specified in the Assessments were despatched by Butlers, as consignors, from their tax warehouse. It is common ground that the conditions set out in Regulation 4 are met.

13. Regulation 7 of the 2001 Regulations provides that where there is an excise duty point as prescribed by Regulation 3 or 4, the person liable to pay the excise duty on the occurrence of the excise duty point is the person shown as the consignor on the accompanying administrative document, or if someone other than the consignor is shown in Box 10 of that document as having arranged for the guarantee, it is that other person. Here, there was no other such person shown in box 10 of the accompanying administrative documents relating to the consignments in issue. Accordingly, the person apparently liable to pay the excise duty under this Regulation is Butlers. As will be seen, Butlers contend that Regulation 7, insofar as it purports to implement part of the 1992 Directive, infringes the principles of proportionality and legal certainty as applied by the law of the European Union.

14. Regulation 7 also provides that any other person who caused the occurrence of such an excise duty point is jointly and severally liable to pay the duty. Here, that may be McKillop and/or Direct Plus. We determine their liability below.

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[1]Registered Excise Dealers and Shippers

15. Regulation 5 of the Excise Goods (Accompanying Documents) Regulations 2002 specified that goods removed in duty suspension from a UK warehouse must at all times be accompanied by an AAD that complies with the Community provisions.

16. HMRC Public Notice No 197 May 2004 entitled *Excise goods: holding and movement* explains the United Kingdom's requirements for the holding and movement of excise goods in duty suspension within the UK and the European Union. Section 66.4 sets out some of the responsibilities of tax warehousekeepers as consignors. It states, in response to the question *What are my responsibilities as consignor? You must convey the goods, or arrange for them to be conveyed, to their destination without delay*. Section 66.13 provides that the consignor should follow his usual commercial practice. He should have checked that the consignee is approved to receive the goods. He should bear in mind that he will be liable in duty if he has not acted prudently and the goods do not arrive at their destination.

17. HMRC also produced a Leaflet entitled *Transporting Excise Goods in the United Kingdom, 2002*. The leaflet is intended to help transporters of excise goods in duty suspension to understand their responsibilities when moving such goods *on UK territory*. It is in the form of answers to questions. One question is - *What should I do if a person, other than the consignor or his agent, asks me to deliver the excise goods to a different address during the journey?* The answer given is *You should deliver the excise goods to the original address shown on the accompanying administrative documentation, and contact the Customs Confidential number* **.

18. Public Notice 197 May 2004, and subsequent versions of it have been substantially revised and replaced by Notice 197, January 2012. It incorporates changes to the Excise Movement and Control System ("EMCS") following the introduction of the Electronic Administrative Document ("EaD") consequent upon Commission Regulation 684/2009.

19. EMCS is an EU-wide electronic system for recording and validating movements of duty-suspended excise goods within the EU. Each movement generates a unique Administrative Reference Code (ARC). The system is no longer paper based and the consignee receives advance electronic notice of the despatch of the goods. That system was **not** in operation when the events, to which the present appeals relate, occurred.

Excise/Transport Documents etc

20. SEED (System for Exchange of Excise Data) is the United Kingdom's database system required to be maintained by Art. 15a of Council Directive 92/12/EEC which provides confirmation of the validity of Tax (Excise) warehouse approvals in other Member States of the European Union. Prior to any movement of excise goods between EU warehouses, it is mandatory that this system is checked to ensure the receiving warehouse is on the approved list.

21. A form W70 is required for drawing goods out of stock. It gives details of *inter alia* the consignor (despatching warehouse), document reference number, port of

shipment, date of removal, place of destination, details of agent at port of shipment, bond details and a description of the goods. It was Butlers' practice to have four copies. They kept the *top* copy; another was kept by them for invoicing; one copy was for the transporter; and the fourth copy (signed by the transporter) was also kept by Butlers.

22. A CMR is an International Consignment Note (lettre de voiture). This is a carrier or transporter's document, which is prepared and signed when the goods arrive. It is an internationally recognised receipt document for movement of goods within the European Union, under the Convention on the Contract for the International Carriage of Goods by Road. It contains details of the carrier and consignee, the place of taking over the goods, and their destination, and details of the goods. It is signed by the transporter and the person completing the document.

23. A W8 form is a United Kingdom internal accompanying document; it is an inter-warehouse document for transfers within the United Kingdom of goods subject to excise duty from one tax warehouse to another tax warehouse. It contains details of the consignor, consignee, the place of delivery, the transporter, and the proprietor of the goods. The consignee receipts the W8 form once the goods have been checked and returns it to the warehousekeeper of dispatch.

24. An AAD is an administrative accompanying document for goods moving between Member States of the European Community from one approved tax warehouse to another. It too contains details of the consignor, consignee, the transporter, the goods, the places of despatch and delivery. Box 10 is to contain details of the movement guarantee. One copy is retained by the consignor, three are passed by the transporter to the consignee. One of those three copies is retained by the Customs authority of the Member State of the consignee; the other two (of three) are passed to the consignee via the transporter, who receipts one and returns the receipted copy of the AADto the consignor usually by ordinary post.

25. A WOWGR certificate is a document produced by HMRC, in accordance with theWarehousekeepers and Owners of Warehoused Goods Regulations 1999 (SI No 1278). In broad terms, it certifies that the person named in the certificate is a registered owner of duty suspended goods held in an excise warehouse. These Regulations are made under and relate to various provisions of the Customs and Excise Management Act 1979.

26. On 2 July 2007, HMRC and the United Kingdom Warehouse Association ("UKWA") entered into a Memorandum of Understanding ("MoU"). Its purpose was to set out a framework for co-operation between HMRC, UKWA and its members to contribute towards the prevention and disruption of smuggling or diversion of alcoholic beverages onto the UK market without payment of excise duty at the earliest opportunity. It sets out a background of smuggling and fraud which costs HM Treasury significant loss of revenue each year. The MoU was not intended to create binding legal obligations (paragraph 7). Annex 4 to the MoU recorded that HMRC and UKWA accepted that frauds are often organised and run by parties distancing themselves from liability/visibility in any duty suspended movements (possibly

operating behind a sham company or individual) and that such activity is often indicated by *unusual indicators* or business acting in an apparently non-commercial way. These included *proposed movements that make no commercial sense.*

Movement Guarantees

27. Under Arts. 13 and 15 of Council Directive 92/12/EEC, the United Kingdom is required to have a financial securities system in place. The Directive requires that system to cover the movement of excise goods. Section 157 of the Customs & Excise Management Act provides *inter alia* that

> The Commissioners may … require any person to give security … by bond, guarantee or otherwise … for the observance of any condition in connection with customs or excise.

28. Under the Excise Goods (Handling Movement Warehousing and REDS) Regulations 1992, a consignment of excise goods could not be moved under duty suspension arrangements unless the duty chargeable on the excise goods was secured.

29. A movement guarantee may be provided by the authorised warehousekeeper, the registered owner of goods in a tax warehouse or the transporter. The level of movement guarantees is based on the average one week's movements calculated over a year, with the minimum set at £20,000 and the maximum at £1m. The purpose of a movement guarantee is to provide some security in relation to liability to duty on irregularities occurring in the course of the movement. In a high proportion of cases, the warehousekeeper has no financial interest in the goods being moved under duty suspension.

30. For a number of years the EU and domestic legal and procedural requirements for the control of the movement of excise goods has been open to abuse and manipulation by fraudsters. Excise duty fraud has been difficult to control. Annual revenue losses are estimated by HMRC to run into hundreds of millions of pounds.

31. HMRC issue a regular news bulletin entitled *Excise News. Excise News* for February 2003 stated *inter alia* that HMRC understood that many traders still did not fully appreciate the implication of allowing their movement guarantee to be used to cover duty suspended movements. It noted that the person who provides the guarantee is always primarily liable for the excise duty on that movement if there is an irregularity. The bulletin goes on to state that - *This applies whether or not the person who provides the guarantee is, in any way, culpable. The prosecution of another person for fraud in no way affects this position.*

The Assessments

32. On 3 April 2008, HMRC issued two assessments to Butlers. The first is in the sum of £201,212, and relates to consignments of (i) 1,144 cases of Glens Vodka (13,278 litres in one litre bottles), despatched on 18 May 2007 and (ii) 1,142 cases of Glens Vodka (13,704 litres in one litre bottles, despatched on 15 June 2007, both destined for Tallin, Estonia. The owner of each consignment was Direct Plus, and the consignee was Contimar OU.

33. The second assessment is in the sum of £310,626, and relates to consignments of (i) 1,664 cases of Glens Vodka (13,977 litres in 70cl bottles), despatched on 10 June 2007, (ii) 1,144 cases of High Commissioner Whisky (13,728 litres in litre bottles), despatched on 11 July 2007 and (iii) 1,144 cases of Glens Vodka (13,728 litres in litre bottles), despatched on 24 July 2012, all destined for the Cadiz area of Spain. The owner of each consignment was Direct Plus, and the consignee was Grand Mariscal.

34. Butlers sought a departmental review of these assessments. By letters dated 11 June 2008 to Butlers, HMRC upheld the assessments. The basis was that each movement consisted of duty suspended goods being despatched from a UK warehouse, which had not reached their destination within four months, that there was an irregularity which was not detected in the UK, and that therefore Regulation 4 of the 2001 Regulations applied. The excise duty point was the time when the goods left Butlers' warehouse. Having regard to the terms of Regulation 7 of the 2001 Regulations and the Accompanying Administrative Documents (AADs), Butlers as consignor was liable to pay the duty. HMRC imposed these assessments on Butlers by virtue of S12(1A) of the Finance Act 1994.

35. Also, on 3 April 2008, HMRC issued Notices of Joint and Several Liability to Direct Plus and McKillop by virtue of Regulation 7 of the 2001 Regulations. Direct Plus sought a departmental review by letter dated 16 May 2008. By letter dated 30 June 2008 HMRC upheld the notice imposing joint and several liability. McKillop sought a departmental review by letter dated 15 April 2008. By letter dated 30 June 2008 HMRC upheld the notice imposing joint and several liability.

Procedural History

36. The appeals of Butlers (Appeal 08/8009 and 08/8010), Direct Plus (Appeal 08/8012 and 08/8013), and McKillop (08/8014) were listed together as they all arose out of the same circumstances. The two Direct Plus appeals were consolidated by Direction dated 10 September 2008. The Butlers appeals were consolidated by Direction dated 27 August 2008. On 17 February 2010, the Tribunal directed *inter alia* that these five appeals (EDN/08/8008, 8009, 8012, 8013 and 8014) should, in relation to all further procedure, be heard together in terms of Rule 5(3)(b) of the Tribunal's Rules.

37. Certain criminal prosecutions have taken place at Manchester Crown Court. Mohammed Tariq, the principal director and shareholder of Direct Plus, was convicted of conspiring to evade excise duty and sentenced to five years imprisonment. He sought leave to appeal. The current status of his conviction and sentence is unknown. Certain steps have been taken against him under the Proceeds of Crime Act 2002, although these may currently be in abeyance.

38. At an earlier stage in proceedings, the appeals were all sisted pending the outcome of criminal proceedings.

39. A Case Management Hearing took place 21 September 2011. HMRC were authorised to amend their Statement of Case in each appeal (essentially in response to an amendment to Butlers' grounds of appeal - see below) and did so. It became clear during that Hearing that the criminal proceedings were irrelevant to the outcome of the tax appeals. There was little dispute on the background facts. None of the Appellants (and they were all then professionally represented except Mr McKillop) submitted that proceeding with the tax appeals while Mr Tariq's criminal appeal remained unresolved, would cause them any prejudice.

40. An application by Butlers for disclosure of information and documents was heard on 17 February 2012. It is only mentioned because it has become the subject of an application for expenses which we consider at the end of our Decision.

41. Finally, it should be noted that Butlers have raised proceedings in the Court of Session against the other appellants and Mr Tariq. The sums claimed are the amounts of the sums specified in the Notices of Assessment (£201,212 [the two consignments of vodka to Estonia] and £310,626 [the three consignments of whisky (1) and vodka (2)] to Spain), plus certain professional expenses incurred in dealing with the disappearance of the consignments of vodka and whisky. The basis of the action is fraudulent and/or negligent misrepresentation. It proceeds on the assumption that Butlers are liable for the duty specified in the notices which are the subject of their appeals to this Tribunal. If their appeals succeed, then the Court of Session action will either fall away or be substantially restricted.

Grounds of Appeal

42. Butlers' original grounds were that Butlers *were wholly innocent of any fraud when other parties identifiable and registered with HMRC actually caused the duty point and revenue loss to occur.*

43. Amended grounds of appeal were presented in 2009 and allowed in 2010. In summary these new grounds acknowledged that the goods failed to arrive at their destination but contended that this was due to the fraud of Direct Plus and/or McKillop. The fraud was said to constitute abnormal and unforeseen circumstances outwith the control of Butlers, which despite exercise of all due care by them could not have been avoided. This constituted *force majeure* and exempted them from excise duty liability.

44. They also advanced a separate ground to the effect that HMRC's assessments infringed their Community law rights. In particular, the principles of legal certainty and proportionality would be infringed. Butlers, it was said, could have had no knowledge that, as a result of fraud, the goods did not leave the United Kingdom. Moreover, having acted in good faith and taken every reasonable measure under their power to ensure that the movement of goods from their warehouse under suspension of duty did not lead to their participation in evasion of duty.

45. The grounds of appeal for Direct Plus lodged with the Tribunal in July 2008 are *Assessment is "Joint and Several". Appellant disputes that he is liable for duty under*

"Joint and Several" Provisions. He [presumably Mr Tariq] *was not involved in the transportation of the goods.* The grounds of appeal submitted by Mr McKillop were that the goods were *delivered outwith the UK to the bond in question therefore no duty is due.*

Facts

46. The Statement of Agreed Facts is detailed and comprehensive. It is in the following terms:-

> **"**1. The Appellant has a place of business at Blaikies Quay, Aberdeen AB22 5PB. It has a tax warehouse at this address in which it stores duty suspended goods under bond.
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> 2. Since April 1990, the Appellant has carried on business consisting of the supply and storage of duty suspended goods. Its customers are primarily fishing vessels, oil rig supply vessels and ferries. Up to 2008 it also supplied oil rigs in the North Sea. These customers purchase duty free tobacco and alcohol from the Appellant.
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> 3. The Directors of the Appellant were at the time of the assessments, Douglas Smith Butler ("DB") (now deceased), Douglas George Butler ("DGB") and Harry George Hanton ("HH").
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> 4. In about 2004, the Appellant was introduced to Mohammed Ajmal Tariq ("Tariq"), who was the owner and director of a company called Direct plus Distribution Limited ("DPDL"). Mohammed Ajmal Tariq styles himself also "A. Tariq". DPDL is also known as Direct Marketing Plus and Direct Plus Marketing and Distribution Limited. DPDL has a place of business at Unit 4, Murraysgate Industrial Estate, Whitburn, EH47 0LE. Tariq wanted to rent space in the Appellant's warehouse to store tobacco products.
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> 5. DB and HH requested and received an Excise Warehousing Registered Owners of Duty Suspended Goods held in Excise Warehouses registration Certificate ("WOWGR") certificate from DPDL to ensure that the Appellant was authorised by HMRC to store DPDL's duty suspended goods in its warehouse. They also visited DPDL's cash and carry warehouse to satisfy themselves that DPDL was a legitimate trader running a lawful business.
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> 6. Tariq as agent for DPDL imported tobacco from a factory in Belgium. DPDL would store this tobacco in the Appellant's warehouse in Aberdeen, DPDL would draw/remove the tobacco as and when needed and always paid the duty on time, usually by bank transfer into the Appellant's account. Officers of the Respondents regularly visited the Appellant to carry out checks on the tobacco held there for DPDL/Tariq. No problems were identified by them in relation to that tobacco. Tariq also provided the names, addresses and locations of his suppliers and overseas bonded warehouses.

7. In early 2007, Tariq on behalf of DPDL approached the Appellant with regard to the storage of duty suspended spirits for sale to customers in Estonia and Spain. He informed DB who informed HH that McKillop Trucking Ltd (contact Roy McKillop) would transport the goods to and from the Appellants warehouse. He also provided the names, addresses and locations of his suppliers and overseas bonded warehouses. Roy McKillop effected, or caused to be effected, the uplift of all consignments.

8. The Appellant obtained an HMRC VAT registration number of DPDL. The Appellant also obtained a WOWGR Certificate dated 17 January 2004 in respect of DPDL.

9. The Appellant enquired of the Respondents using the computerised standard System for Exchange of Excise Data ("SEED") checks whether the Contimer and Gran MariscalSiglo XVIII warehouses were registered with their respective domestic authorities for receipt of duty suspended goods. They received confirmation that those warehouses were so registered in respect of the goods intended to be transported to them.

10. In respect of each consignment of spirits transported in accordance with Tariq's instructions, the Appellant followed all procedures required of it in HMRC's published guidance (Notice 197, paragraph 37) in relation to receiving and thereafter consigning goods on an excise duty suspended basis, although they did not themselves arrange the transportation.

11. The Appellant obtained a WOWGR certificate in respect of the person from whom the Goods were being purchased in consignments 1, 2, 3, 4 and 6, namely Abbey Forwarding (consignment 1), Allied Ship Supplies (Ireland) Ltd (consignments 2, 3 and 4), and Bosworth Beverages Limited (consignment 6). The seller of consignment 5 was G101 Sales Limited based in Glasgow. The Appellant had previously done business with that company, and already had a WOWGR for it. The Appellant has not been able to find in its files a copy of the WOWGR it obtained for either Abbey Forwarding or G101, which it is believed may have been accidentally disposed of.

12. In respect of each of the consignments the Appellant:-

a. received a delivery note and checked it against the goods;

b. received a W8, checked it against the goods, and signed and returned the appropriate copy to the warehousekeeper of dispatch;

c. obtained HMRC confirmation that the warehouse to whom the consignments were to be transferred was authorised to receive goods on a duty suspended basis;

d. completed the relevant form W70 for signature by the transportation company;

e. completed the appropriate Administrative Accompanying Document ("AAD") and gave it to the driver to accompany the consignment;

f. signed a CMR?Lettre de Voiture (except for consignments 4 and 5, for which a Lettre de Voiture signed by the appellant is not available);

g. in due course received back the relevant copy of the AAD purporting to have been signed, dated and stamped by the consignee warehousekeeper (except for consignment 6).

13. There were six consignments of alcohol in total. The first five consignments (three of which had a destination in Spain and two of which had a destination in Estonia) arranged by Tariq appeared to the Appellant to have been delivered in accordance with the documentation. On each occasion the AAD was returned and appeared to have been duly signed and stamped by the warehouse that was to be receiving the goods. The purchase of the third and fourth consignments was funded by the Appellant on DPDL's behalf. The Appellant purchased the third and fourth consignments at £15, 496 and £19, 874.80. It rendered to DPDL invoices in the respective sums of £18,470.40 and £20,592. The first consignment was obtained by Tariq/DPDL and transported to the Appellant's premises on behalf of Glenpark International Limited, Unit 114, Millennium Business Centre, 3 Humber Trading Estate, London NW2 6DW, having been removed from Abbey Forwarding Limited, 50 Purland Road, Nathan Way, West Thamesmead Business Park, London SE28 0AT. The second consignment was obtained by Tariq/DPDL and transported to the Appellant's premises from Allied Ship Suplies (Ireland) Limited ("Allied"), Unit 5 Site 18 Ballinsk Road, Springtown Industrial Estate, Londonderry. The third consignment was obtained by Tariq/DPDL and transported to the Appellant's premises from Allied's Londonderry premises. The fourth consignment was obtained by Tariq/DPDL and transported to the Appellant's premises from Allied's Londonderry premises. The fifth consignment was obtained by Tariq/DPDL and transported to the Appellant's premises from G 101 Off Sales Limited, Burnfield Road, Glasgow G46 7TT. The sixth consignment was obtained by Tariq/DPDL and transported to the Appellant's premises from Bosworth Beverages Limited, Dovecote Cottage, Shackerstone Walk, Carlton, Nr. Nuneaton, Warwickshire. Each such consignment was held in the Appellant's warehouse for a matter of days before dispatch to the ostensible destinations appearing in the respective AADs. Each such movement ostensibly to such destinations proceeded using the Appellant's movement guarantee.

14. In respect of the sixth consignment, on 8 June 2007, Tariq called DB stating that he had sourced 3250 cases of Teachers whisky from Bosworth Beverages, but due to cash flow DPDL could not pay for the load. He asked if the appellant would pay for the goods and then invoice DPDL when he would be in a better position to pay. The Appellant agreed to this course of action. The purchase of the sixth consignment was funded by the Appellant on DPDL's

behalf. The Appellant purchased the sixth consignment at £52,470.00. It rendered to DPDL an invoice in the sum of £54,047.50. Tariq paid for them by three post-dates cheques all of which were in due course honoured.

15. The Appellant received oral instructions from Tariq to ship the consignment to Grand Mariscal in Spain. McKillops were the transporters. On 17 August 2007, the load was despatched from Aberdeen. On 18 August 2007 DB received a call from Tariq stating that the lorry had broken down in the Midlands and that the load had been taken to a warehouse in Walsall. DB was concerned about this and asked Tariq if it was a bonded warehouse. Tariq was unable to confirm this. DB then telephoned the driver who stated that the goods had been taken to the yard of a company called AJK Travel (UK) Limtied ("AJK"). The driver stated that he did not know whether this was a bonded warehouse.

16. The driver informed DB that the person handling the situation on behalf of HMRC was Jon Hitchman ("JH"). The dirver supplied DB with JH's telephone number and DB telephoned JH in order to establish the situation. DB left a message, including a telephone number, requesting that JH contact him. A telephone conversation between DB and JH took place on 18 August 2007, commencing at or about 13.25pm upon JH's return from the premises of AJK whereupon he picked up DB's message. JH had been attending the premises of AJK at Bentley Business Park, Bentley Lane, Walsall where the Respondents had seized most of the sixth consignment of 26 pallets of Teacher's Whisky despatched by the Appellants the preceding day and on the face of the AAD destined for Spain. DB stated to JH the fact that he was the managing director of the Appellants. DB wanted to know what was happening to the consignment of whisky packed the preceding day and destined for Spain. For initial security purposes JH asked DB for his warehouse code and Movement Guarantee number. DB stated that he would get these details and phone JH again. At 14.06 JH phoned DB in response to a call in which a different Aberdeen number from that previously used had been provided. DB provided the Appellant's Warehouse Code and Movement guarantee numbers. JH asked DB what his involvement in relation to the consignment of 26 pallets of Teacher's Whisky had been. DB stated that, having despatched the consignment destined for Spain the previous day, he was contacted by his customer (whose name he gave as "A. Tariq"; "Tariq") at approximately 11.00am on the 18th and informed that the load had to be off-loaded into premises in Walsall due to the lorry breaking down. DB explained that the vehicle had to be removed before it went into repair. DB explained that the consignment was being transported on behalf of A Tariq under the name of DPDL. DB quoted DPDL's company number as 218782 and VAT No. as 7889 8565 37. DB explained that DPDL – at any rate Tariq himself – told the Appellant where the consignment of alcohol was to be sent. This was how the Appellant knew of Tariq's Spanish-based customer's warehouse Gran MariscalSiglo. JH asked DB how he knew Tariqu. DB explained that he had known Tariq for two years. Tariq placed cigarettes in bond in the Appellant's warehouse. The cigarettes were said to be manufactured and sourced in Belgium under Tariq's brand name "Ultimate

Cigarettes". DB stated that he had had several telephone conversations with Tariq earlier that day (the 18th). He provided JH with contact nunmbers for Tariq; 0790 3153240, 01501 745564, 01501 745587. JH asked how many previous transactions DB had had with Tariq. DB stated approximately four, each of which was said to have been of Glens Vodka despatched for Spain. JH asked DB to send the paperwork for (a) the transaction relating to the movement of 26 pallets of Teachers Whisky, (b) company formation details regarding DPDL, (c) prior movements involving DPDL. JH informed DB that he had concerns regarding the consignment of Teacher's Whisky reaching its Spanish destination on the following grounds:

- Two pallets of whisky had been removed from the truck at the Walsall address
- Three further pallets of whisky were in the process of being removed from that address;
- A box of whisky had been opened and part of its contents was missing.

JH warned DB that he had since seized and secured the remaining whisky and vehicle at the premises of AJK and informed DB that local HMRC staff would shortly be in touch with him. DB stated that he was astounded by what he had been told and offered to provide all necessary assistance. The call was concluded at 15.10 hours.

17. The Respondents became aware (a) that the consignment of Teacher's Whisky which was seized in Walsall on 18 August 2007 might fail to arrive at the destination specified in its AAD on the preceding day (b) that previous consignments destined for Spain and Estonia had failed to arrive (i) upon discovering from the Spanish authorities on 12 December 2007 that Mr Antonio Mariscal, administrator of Gran MariscalSiglo XVIII SL, Cadiz, Spain had declared that he and that company had no knowledge of the consignments of goods belonging to DPDL despatched by the Appellants to which AADs numbered 66609, 66158 and 66403 related (ii) upon receiving from the Estonian Authorities on 14 September 2007 notification that the consignments of goods belonging to DPDL despatched by the Appellants to Contimer OU ("Contimer") warehouse, Tallinn, Estonia to which AADs numbered 66064 and 65643 related had failed to arrive at their destination; that Contimer had not submitted information relating to the goods to the host tax and customs authorities; that the ostensible signatory of those AADs, Sven Aiaste, was not authorised to sign on behalf of Contimer; that the ostensible signature of Sven Aiaste was not his and did not resemble that in his passport. An image file of Aiaste's passport signature was received by the Respondents from the Estonian authorities on 12 November 2007.

18. On 3 April 2008 the two assessments which are the subject of these Appeals were issued to the Appellant. On 2 May 2008 DB and HH as directors of the Appellant had a meeting with Alexander Stobie and Craig Clark, both

being officers of the Respondents. At this meeting they provided details of other checks which had been carried out on the consignments following the assessments. The Appellant stated to Mr Stobie that they had established that the consignments had not arrived with Contimer. Due to language difficulties the Appellant stated that they were unable independently to satisfy themselves whether or not the goods consigned to Spain had arrived with Gran Mariscal.

19. On 16 June 2011 at Manchester Crown Court Tariq was convicted along with other persons not involved in these appeals of conspiracy to evade excise duty, in contravention of Section 170(2)(b) of the Customs and Excise Management Act 1979. The Crown case on the basis of which such conviction proceeded comprised evidence that Tariq, acting as DPDL, organised each of the consignments to which the assessments relate. In Proceeds of Crime Act 2002 proceedings before that Court it is maintained that Mohammed Tariq has benefited from his criminal conduct to the extent of the duty exigible upon the respective consignments to which the assessments relate.

20. The failure of the goods to arrive at their respective destinations was caused by the fraud of Tariq/DPDL and the actings of Roy McKillop and possibly third parties unknown.

21. The Appellant did not participate in, and was unaware of, the irregularity (which the parties acknowledge to have been such for the purposes and within the meaning of r.2. of the Excise Duty Point (Duty Suspended Movement of Excise Goods) Regulations 2001 No. 3022.**"**

[The text of the Statement of Agreed Facts contains a number of infelicities but it is not for the Tribunal to correct it.]

47. The facts specified in the Statement of Agreed Facts are, in any event, established by the evidence adduced. Butlers, through their solicitors, produced thorough and detailed Witness Statements which were largely vouched by a comprehensive compilation of documents. We make the following additional findings of fact (as a matter of convenience we also add various comments on the evidence in this section of our Decision).

Butlers' Dealings with Tariq/Direct Plus

48. Between about 2005 or possibly 2004 and 2007 (at least until the events giving rise to these appeals unfolded) the relationship between Tariq and Direct Plus with Butlers was that of normal business traders. There was nothing about the way Tariq or Direct Plus conducted business with Butlers which aroused Butlers' suspicions. Nor would the suspicions of a reasonably prudent warehousekeeper exercising all due commercial care have been aroused.

49. At the material time, in 2007, Butlers had a movement guarantee in place in the sum of £20,000.

50. The AADs for each of the five consignments to which the appeals relate contain entries showing Butlers as the consignor. Box 10 of each AAD is blank. No other person is shown in Box 10 as having arranged the guarantee.

Roy McKillop

51. Mr McKillop was 58 years old when he gave evidence. He has been a self-employed heavy-goods vehicle driver for about 22 years. In 2007, he was carrying on a general haulage business at Hillington Park, Glasgow. He owned two vehicles. At one stage in his career he had a fleet of twelve vehicles.

52. Prior to 2007, Mr McKillop had some experience of the haulage of excise goods and the import and export of goods. His first contract with Tariq (he did not distinguish between Tariq and Direct Plus) related to household goods. He had also transported goods for Tariq/Direct Plus to and from Butlers' warehouse on several occasions prior to 2007, including tobacco from Belgium.

53. At some point in early 2007, Tariq contacted him and raised the possibility of a contract for the haulage of consignments of alcohol to Estonia and Spain. Mr McKillop submitted prices for the work. Mr McKillop produced no documents about this and did not go into detail. However, agreement on price seems to have been reached. McKillop was paid in full for his work except for the last load which was seized by HMRC or the police.

54. McKillop sub-contracted some of the work. The haulage of the first consignment referred to above was undertaken by a man named Dave Sell. Sell collected the goods from Butlers at Aberdeen and drove south. When the driver had reached Carlisle or a little beyond, he telephoned McKillop to say that he had received a phone call on his mobile phone from someone (unidentified) saying that he was the owner of the goods. McKillop had given Sell's mobile number to Butlers and Tariq. Apart from that, McKillop had no significant dealings with Butlers.

55. The (unidentified) owner informed Sell that there was a problem with the bond and that the goods were not to be taken to their original destination (vodka to Estonia). McKillop phoned Tariq who informed him that the goods should be taken to wherever the owner requested. Tariq informed McKillop that he would still be paid. The driver Sell took the goods to an unknown destination in the London area where they were unloaded. Sell then proceeded to East Germany to collect a back load which had previously been arranged by McKillop.

56. Much the same happened to the other four consignments which are the subject of the assessments, although the place within the UK where the goods were unloaded varied. McKillop was the driver for two of the consignments. When he was the driver no backloads were arranged. In relation to one of the consignments for Spain, the driver proceed to the Cadiz area to collect a backload. There is nothing in the evidence to suggest that either Sell or McKillop mentioned to Butlers that they had been instructed in transit to deliver the goods to destinations within the United Kingdom rather than Estonia or Spain.

57. In relation to the last (sixth) load (whisky to Spain), McKillop received a call from the driver to say that his vehicle's engine had a water leak and needed repairs. McKillop went to Tariq's premises at Whitburn; there, they arranged for the vehicle to be driven to a garage. However, the vehicle was taken to a warehouse or lorry park at Walsall and unloaded. The circumstances are more fully described in paragraphs 15 and 16 of the Statement of Agreed Facts. The vehicle proceeded to mainland Europe to collect a backload. There are, however, no records of the vehicle's movements. It cannot be determined with certainty whether the backload arrangement was made on the basis that the vehicle was not expected to travel all the way to Spain. However, it does arouse some suspicion.

58. McKillop contacted Butlers and informed them of the position. McKillop telephoned Tariq but obtained no response.

59. McKillop said in cross-examination (by Mr Francis - he was not cross-examined by Mr Ghosh) that the AADs were in a sealed envelope and he never saw them. This was not challenged by anyone and we are prepared to accept that evidence. McKillop also stated in cross-examination that if Butlers had shown him a copy of HMRC Leaflet *Transporting Excise Goods in the UK (02/CD/022)* he would not have allowed the goods to be delivered within the United Kingdom. We view this piece of evidence with some suspicion and are not prepared to accept it. His acceptance of the proposition put to him in cross-examination appeared to us to be simply a response which he McKillop thought might be favourable to his cause.

60. Mr McKillop's grounds of appeal were and always were that goods were *delivered outwith the UK to the bond in question therefore no duty is due.* That is plainly nonsense, as Mr McKillop well knew from the outset. In evidence, he was unable to provide any coherent or satisfactory explanation as to why that ground was ever advanced. At one stage in his evidence, he said that he thought it was *a bit odd* that goods originally destined for Spain or Estonia were, at short notice, to be delivered within the United Kingdom. He later said it was not unusual to be told to deliver the goods to somewhere different from the original destination. While we accept that he may have found the repeated last minute change of destination odd, we cannot accept that the circumstances he described in evidence were *not unusual.*

61. While it is true that he arranged backloads for some of the consignments, it seems to us that he must or ought reasonably to have been aware that the arrangements were irregular and suspicious. Our assessment, based on his evidence as a whole, the manner in which he gave it and his somewhat cavalier attitude to the appeal generally, is that (at best for him) he turned a blind eye to what was going on in 2007. Had he been acting responsibly, he would not have delivered or authorised the delivery within the United Kingdom of excise goods originally destined for Estonia or Spain, without making further enquiries eg of the consignor, Butlers. He did not, however, do so.

Post Seizure Events

62. On or about 7 November 2007, 14 bottles of High Commissioner Whisky were discovered in a Glasgow shop. It was ascertained these bottles were part of the 11 July 2007 consignment (referred to in the second Assessment)

63. At the meeting on 2 May 2008, Mr Stobie confirmed that Butlers had followed the correct procedures and expressed the view that there was nothing else he expected them to have done. In particular, he said that there was no requirement for Butlers to have contacted the receiving warehouses in Estonia and Spain. He also stated that the seizure of the goods on 18 August 2007 was, at that stage, unrelated to the earlier consignments of whisky and vodka despatched by Butlers.

64. Following the meeting on 2 May 2008, Mr Hanton emailed Butlers' solicitors, Paull & Williamsons on 6 May 2008, narrating his account of the meeting. The email deals with a variety of matters. It states *inter alia* that Hanton asked the HMRC officials if Butlers had followed the correct procedures according to HMRC Regulations. According to the email Alex Stobie (HMRC officer) *stated that we had and there was nothing else we should have done.* We are satisfied that this part of the email accurately reflects what Mr Stobie said. Mr Hanton confirmed the position in evidence in chief. We believed him.

The reasonableness of Butlers' conduct (due commercial care etc)

65. When Mr Butler and Mr Hanton visited the premises at Whitburn what they observed appeared to be a legitimate trader operating a lawful and successful business. Their financial arrangements with Tariq/Direct Plus operated smoothly. Charges were agreed and paid for. On several occasions Butlers initially funded purchases but were always promptly repaid by Direct Plus.

66. At some point before the first consignment was despatched, Mr Hanton contacted the HMRC Helpline for advice on paperwork. He was not advised to intimate the transaction to the receiving warehouse in advance, or to obtain confirmation of receipt of the goods immediately on their arrival. Nor was he advised not to *let the owner of the goods use Butlers' movement guarantee*. He was not told to adjust the level of his movement guarantee.

67. There was nothing unusual or suspicious about Direct Plus organising and using their own transporter (McKillop). It is normal or at least common for the owner of goods to make his own arrangements for their transport. In agreeing to or acquiescing in this arrangement, Butlers complied with paragraph 66.4 of Notice 197.

68. It was not normal practice in 2007 for a consignor such as Butlers to alert the transporter (here, McKillop) of the risk of diversion fraud. It has not been established that it is normal practice to hand such a transporter HMRC leaflets about transporting excise goods such as *Transporting Excise goods in the UK 02/CD/022*, prior to the removal of the goods from the consignor's warehouse. Butlers did not supply McKillop with any such leaflets. The omission to do so is not evidence of a failure to take due commercial care. In any event, McKillop, to Butlers' knowledge, was an

experienced haulier. It is simply unrealistic to suggest that they should have passed a copy of the leaflet referred to, to McKillop or David Sell, or that failure to do so demonstrates a lack of due commercial care.

69. It was not normal practice in 2007 to inform receiving warehouses in advance of a consignment or for receiving warehouses to confirm by telephone or electronically, immediate safe receipt of the goods. When acting as a receiving warehouse, Butlers never received calls from the warehouse dispatching the goods.

70. The system has changed somewhat since the events of 2007. In April 2009, HMRC issued a Consultation Document entitled *Review of Excise Finanial Securities.* One of the options for reform proposed was only allowing the authorised warehousekeeper to provide the movement guarantee (paragraph 5.3); the aim was said to encourage warehousekeepers to exercise due diligence in respect of their business relationships and specific transactions and to exert greater control over the transport of goods. This proposal was roundly rejected by the United Kingdom Warehousing Association (UKWA). In their formal response to the Consultation Document, they pointed out that risk was assessed from the past trading experience of the customer; that in most cases the warehousekeeper has no care or control of the goods, has no financial involvement in the transaction, does not have the ability to influence what happens after the goods leave the warehouse following the instructions of the owners; and that the warehousekeeper has no means or right to require detailed information about the transaction beyond what is required for him to fulfil his part of the operation.

71. Nor did the Bonded Warehousekeepers Association support the option mentioned above. They observed that the Consultation Document implied that the arrangements under review were not fit for purpose; they rejected any suggestion that the main responsibility of exercising due diligence when dealing with the owners of goods in warehouses should rest with authorised warehousekeepers. They acknowledged that there was room for increased efforts to test the *bona fides* of owners but pointed out that warehousekeepers did not have access to the sources of intelligence available to HMRC; warehousekeepers had to rely on HMRC to carry out enquiries, as they did in connection with WOWGR.

72. Since January 2011 a procedure laid down by HMRC has operated whereby the receiving warehouse and HMRC are notified in advance when a movement is being raised and, in effect, when the goods are expected to arrive at the receiving warehouse. These new arrangements involve an electronic monitoring system which is designed to record and check movements of duty - suspended goods within the European Union. The AAD has been replaced by an electronic administrative document (EaD). If the goods do not arrive on the due date, the consignor and HMRC are notified. Such an arrangement would have thwarted, in large measure, the fraudulent conduct of Tariq/Direct Plus.

73. There was no apparent commercial purpose in transporting the consignments of whisky to Aberdeen where they remained for short periods and then transport them south again en route for Spain and Estonia. However, such arrangements are not

unique and given the past trading history between Butlers and Direct Plus they were not sufficient to have required a warehousekeeper, exercising all due commercial care in the circumstances in which Butlers were placed, to do anything over and above what Butlers actually did. In the circumstances, Butlers took every reasonable measure in their power to ensure the consignments of whisky and vodka dispatched in 2007 which are the subject of the assessments to which these appeals relate, would not become the subject of theft, fraud or irregularity or otherwise lead to their entry into the European economic circuit without due payment of excise duty.

Submissions

74. Julian Ghosh QC for Butlers submitted, in summary, that throughout, Butlers acted in good faith; they acted to the standard of care HMRC were entitled to expect having regard to their public notices. If *best practice* suggests something further should be done, HMRC are not entitled to demand it. In particular, there was no obligation to provide McKillop with Leaflet *Transporting Excise Goods in the United Kingdom, 2002*.

75. The UK Regulations which imposed on Butlers strict liability for a fraud which they had nothing to do with (Regulation 7 of the 2001 Regulations), infringed the principles of proportionality, and/or legal certainty and went beyond what was necessary to achieve a legitimate aim, namely to protect the exchequer from fraudulent evasion of excise duty; accordingly, Regulation 7 fell to be disapplied as being contrary to European law.

76. Butlers had no choice under the UK and European legislation but to provide a movement guarantee. The notion of letting someone else use their guarantee is erroneous. Imposing 100% strict liability on Butlers, even if they adopted *best practice* was disproportionate. Regulation 7 of the 1992 Regulations therefore had to be given a *sympathetic* construction to accommodate the principle of proportionality, and if that cannot be done it must be disapplied as it offends the European Union principles of proportionality and legal certainty.

77. Alternatively, what occurred was *force majeure*. That part of the 1992 Directive, which provided an exemption from liability on grounds of *force majeure* had not been transposed into the United Kingdom Regulations, but the Directive nevertheless had direct effect

78. Mr Ghosh in his written skeleton argument and in submissions relied upon the following cases:- *Vlaamse Oliemaatschappij NV v FOD Financien*Case C-499/10, *Netto Supermarket GmbH & Co OHG v Finanzamt Malchin* Case C-271/06, 2008 STC 3280, *Heintz van Landewijck Sarl v Staatssecretaris van Financien* C-494/04 2006 ECR 1-5381, *Blue Sphere, Axel, Mobilix, Ministerodelle Finanze v Esercizio Magazzini Generali SpA* 1984 3 CMLR 217. Reference was also made to *R (aoa) Teleos v HMRC* Case C-409/04 2008 STC 706, *Garrett Trading Ltd (Decision E101061, Ghaidan v Godin-Mendoza* 2004 2 AC 557 (HL) at paragraph 33, and *HMRC v IDT Card Services* 2006 STC 1252 (CA) at paragraph 92.

79. Mr Francis, for HMRC, submitted that Direct Plus and McKillop were both jointly and severally liable, having caused the occurrence of the excise duty points resulting from the application of Regulation 4(2) of the 2001 Regulations. He urged us to regard Douglas Butler as an unsatisfactory witness; he submitted that Mr Powell gave the impression of a witness whose wish to adhere to his witness statement conflicted with his objectivity and honesty. Mr Hanton's evidence of what Mr Stobie said at the meeting of 2 May 2008 should be discounted. Overall, the evidence did not establish that Butlers took every reasonable measure in their power to prevent fraudulent evasion of duty. He relied in particular in what he described as the dog-leg movement of the goods to Aberdeen which was, he argued, manifestly uncommercial.

80. Mr Francis submitted that the aim of the 1992 Directive was to place the provider of the guarantee in the position of an insurer; strict liability was imposed by Art. 20(1) subject to Art. 14(1). This provided a framework within which the principles of proportionality and legal certainty had to operate. Support for this view was to be found in *Re the Arena Corporation* 2004 EWCA civ 371 at paragraph 28, *Telios*at paragraph 58, *Greenalls Management Ltd v CCE* 2005 1 WLR 1754. *Greenalls* supports the view that the strict liability of the warehousekeeper is proportionate. That arises where he chooses to be the consignor. The liability of the authorised warehousekeeper of dispatch is the default setting under Art. 15(3). The scope for contending that Regulation 7 of the 2001 Regulations offends the principle of proportionality was strictly circumscribed. The fixing of liability on the warehousekeeper was the very thing which the 1992 Directive envisaged through its architecture and objectives or aims. Butlers' argument is tantamount to saying that Art. 15(3) and 20 offend the principle of proportionality. Proportionality in the VAT regime is entirely different

81. He further submitted that the facts amounted to an irregular departure from the suspension arrangements for the purposes of Art. 6(1)(a). Regulation 7 of the 2001 Regulations gave effect to Art. 20(1) so has to be construed consistently with the Directive.

82. In relation to *force majeure,* Mr Francis submitted that there were no losses within the meaning of Art.14. He referred to the French and Italian texts. He argued that Art. 14 should be construed narrowly; it referred to irretrievable loss of duty suspended goods. He relied on *Esercizio*and *An BordBainne.* Even if what occurred constituted *losses* within the meaning of Art.14, these losses were foreseeable.

Discussion

Evidence

83. We found the evidence of Mr Hanton and Mr Butler to be credible and reliable. As already noted, they provided detailed written statements which they amplified in evidence. They were not shaken in cross-examination. In particular, Mr Hanton was clear in his recollection of what Mr Stobie said at the meeting on 2 May 2008. Mr Stobie did not deal with this in detail in his witness statement and did not give oral evidence. Mr Hanton emailed his solicitor at Paull & Williamsons on 6 May 2008

and described what transpired at the meeting. We have no reason to doubt the accuracy of that email (apart from a minor discrepancy over the date, which is immaterial), written shortly after the meeting. Craig Clark's (HMRC officer) manuscript notes of the meeting attached to his unchallenged witness statement are brief but record *inter alia Can't say what they could have done to confirm goods arrived.* As far as it goes, this is consistent with Hanton's account. Moreover, the notes do not record any failure or lack of due care on the part of Butlers.

84. We also found Mr Powell to be credible and reliable. He had a particular combination of qualifications and experience which added weight to the expert evidence which he gave about practice and, in particular, what ought reasonably to have been done in the circumstances in the exercise of *all due commercial care* or similar phrases conveying the same essential notion of taking all reasonable precautions and steps to guard against fraud. There was no doubt in Mr Powell's mind that Butlers acted correctly. In essence, he was agreeing with the contemporary view expressed by Customs officers at the meeting in May 2008 referred to above. We consider that the various criticisms of his evidence advanced by counsel for HMRC were unwarranted. His evidence was given with care and overall he was not moved from the thrust of his views expressed in his written statement.

85. The fact that the goods were being conveyed to Butlers' warehouse for short periods and then taken south again was not something which ought to have put Butlers on their guard or to be suspicious or to take extra precautions (whatever they might be). The line that the arrangements were uncommercial for that reason was a theme of Mr Francis' cross-examination. Mr Butler would not accept it. There was no evidence to support the argument. Mr Powell acknowledged that some warehousekeepers would if *fully circumspect* have contacted the Estonian warehouse (where the first consignment was to be delivered) but he maintained that Butlers acted *wholly correctly* and had done nothing wrong in terms of the *standard obligations in law.* We agree. We do not find sufficient support in the evidence for the conclusion that *all due commercial care* required Butlers to contact the Estonian warehouse before releasing the goods. In particular, we reject the assertion that Mr Powell lacked objectivity or integrity.

86. HMRC asserted in their Statement of Case that there were a number of *obvious* steps which Butlers, in the exercise of due care, should have taken. These in summary were (a) they could have booked in the consignments with the receiving warehouse, (b) they could have used forms of enquiry forwarded to the receiving warehouse with questions as to their business and the expected consignments, (c) they could have contacted the consignee warehousekeeper to ascertain that the consignment had been received, (d) they could have used their own trusted haulier, (e) they could have passed the leaflet *Transporting Excise Goods in the UK* to the driver, and (f) and in the absence of taking these steps they should have withheld the use of movement guarantee, ie not acted as consignor.

87. The difficulty with this line of argument which was taken up with considerable vigour by Mr Francis in cross-examination and addressed at some length in his written submissions is that it is not supported by the only expert who gave evidence;

it is not supported by such evidence of practice as we heard; it was not supported by HMRC officers who did not deal with the points in detail in their written statements and did not give oral evidence. Finally, it runs contrary to the evidence we have accepted of what transpired at the meeting attended by *inter alios* Mr Hanton and Mr Stobie. Mr Stobie, who appears to be a very experienced Customs Officer with 35 years of experience, had been involved in the investigation since August 2007. He makes no reference to these so-called obvious steps in his statement. Nor does his colleague Craig Clark (over 25 years of experience as a Customs officer).

88. While Mr Powell acknowledged in cross-examination that some of these steps would have been reasonable, he did not accept expressly nor did he impliedly accept that Butlers' conduct displayed a lack of due care or demonstrated something less than the due diligence of a circumspect warehousekeeper.

89. We conclude on the evidence that Butlers did all that could reasonably be expected of them. Whether one describes this conclusion as all due commercial care having been taken, or all the due diligence of a circumspect warehousekeeper, does not matter. They are all different ways of expressing the same notion, namely that Butlers acted properly, carefully, reasonably and in good faith throughout. Whether some higher standard of *best practice* might have been achieved does not, in our view, matter. Standards can always be improved. The fact that, with hindsight, it might be concluded that, had an additional precaution been taken, loss would have been avoided, is nothing to the point. The fact that a precaution is a reasonable one to take does not mean that it is unreasonable or shows a lack of due commercial care not to take it, particularly against the background of HMRC's detailed manual of guidance (Notice 197) which makes no mention of it.

90. The only guide we have on whether Butlers acted with all due commercial care is the contents of Notice 197 and the expert evidence of Mr Powell, plus our own assessment of the facts and circumstances. It is accepted Butlers complied with the guidance contained in HMRC Notice 197 in force in 2007 (Statement of Agreed Facts paragraph 10). Mr Powell's final position in evidence was that Butlers acted wholly correctly. He agreed that it would have been reasonable to contact the receiving tax warehouses in advance and that it would be reasonable to conclude that the route taken by the goods (north to Aberdeen for a few days and then south again to the Channel Ports) was strange, but as we have said that does not mean that Butlers fell below the standard of *all due commercial care.* It was not the practice to contact receiving warehouses in advance. Notice 197 did not require it. Moreover, Butlers had a reasonably good business relationship with Tariq/Direct Plus. They had traded for several years without any significant problems. Finally, there was no evidence that it was the practice that warehousekeepers or consignors to hand to the transporter or his driver the leaflet *Transporting Excise Goods in the United Kingdom, 2002* either on or before the departure of each and every, or even any consignment. It might well be reasonable to do so, but that does not mean it is unreasonable or shows lack of due commercial care not to do so. Butlers were at least entitled to assume that McKillop, who was an experienced haulier and independent contractor, knew what he was doing and was honest. It was not incumbent on Butlers to tell him what his responsibilities were.

Law

91. We consider first the question of ***force majeure.*** It is common ground that Art. 14(1) of the 1992 Directive has not been transposed into the domestic law of the United Kingdom, and that it has direct effect. Butlers may therefore rely on it.

92. However, the preliminary question is whether *losses* occurred *under suspense arrangements* within the meaning of Art. 14(1). Apart from a few bottles of whisky, which were discovered in Glasgow, all consignments have disappeared. Where they will re-surface and in what market, within or outwith the European Union is unknown on the evidence. Loss is not defined in the Directive. It must be something different from losses *inherent in the nature of the products during production and processing, storage and transport.* Such inherent losses appear to relate to the physical properties of the product. Thus diminution in quantity or unavoidable leakage reducing the volume of the product seem to amount to a loss inherent in the nature of the product. The product is *pro tanto* destroyed to the extent inherent in the nature of product during production, processing, storage or transport.

93. In *Esercicizio* excise goods were stolen from a customs warehouse in Italy. The national legislation excluded theft from the concept of loss (paragraph 5). *Loss* meant dispersion of the goods, not their removal. The tax authorities demanded customs duty and VAT from the warehouse manager and the owner of the goods. Under Community law, exemption from payment of duty applied where the goods were destroyed or there was irretrievable loss of the goods as a result of the nature of the goods themselves or because of unforeseeable circumstances or *force majeure* (paragraph 13). The Advocate General interpreted the Community law as meaning that only events which were capable of rendering the goods unusable not only for the owner but for anyone may be regarded as extinguishing the debt. The reasoning is based on the principle that the customs debt is conditional on the entry of the goods into the economic circuit; if they are destroyed or deteriorate totally then they cannot be marketed and are therefore exempted from the debt. Thus, theft does not make the goods unusable for the economic purpose for which they are intended and so does not extinguish the customs debt.

94. The Court of Justice, accepting the thrust of the Advocate General's reasoning, held that the reason for exemption was based on the fact that the goods had not been used for the economic purposes which justified the application of import duties. The Court held that in the case of theft *it may be assumed that the goods pass into the Community commercial circuit.* Therefore *loss* of the goods for the purposes of the Directive did not embrace the concept of theft, regardless of the circumstances in which it was committed. Thus, theft of the goods, even without any fault of the taxpayer did not extinguish the obligation to pay duty on them. The Court, following the approach of the Advocate General (in the penultimate paragraph of his Opinion) was essentially considering the meaning of *loss* rather than *unforeseeable circumstances* or *force majeure.* As the event (theft) did not fall within the meaning of *loss* it was unnecessary to consider the cause of the event.

95. If the reasoning in *Esercicizio* applies to the facts of the appeals before us, then what happened to the consignments of excise goods whether described as theft or fraud, does not fall within the meaning of *losses* in Art. 14.1.

96. We are unable to distinguish the analysis in *Esercicizio.* On that basis, what happened to the consignments of excise goods does not fall within the meaning of losses within Art. 14.1. Mr Ghosh relied on the phrase quoted above (*it may be assumed*) and submitted that this created a presumption which is rebuttable. Even if that is correct, the evidence and the facts as we have found them to be do not rebut any such presumption.

97. As we have concluded that what happened to the consignments of excise goods in 2007 did not constitute *losses* within the meaning of Art. 14.1 of the 1992 Directive, the first ground of appeal must be dismissed. It is therefore unnecessary to consider whether what occurred was attributable to *fortuitous events* or *force majeure.* In case our conclusion is wrong, however, we consider these phrases briefly.

98. Are these two sets of circumstances, or does the latter explain the former? *Fortuitous* normally means by chance or accident. It is difficult to describe the disappearance of the consignments of whisky and vodka as *fortuitous. Force majeure* is a difficult phrase to construe. It is normally associated with the doctrine of frustration in the law of contract. A contractual *force majeure* clause normally sets out circumstances which exclude, limit or relieve a party from liability where the common law doctrine of frustration would not. Such circumstances may include strikes, war, civil commotion, and act of God.

99. *SPMR* concerned the interpretation of *force majeure* within the meaning of the first sentence of Art. 14(1) of the Directive 92/12/EEC. The essential facts were that the customs authority claimed excise duty on fuel which had escaped from an oil pipeline in which it was being transported from France to Switzerland under excise duty suspension arrangements following leakages and the subsequent bursting of the pipeline. This was caused by corrosive cracking a process unknown at the time and incapable of being detected with the technical devices then available.

100. The European Court of Justice held that the fact that each Member State is to lay down conditions under which the exemptions are to be granted did not affect the meaning or scope of the term *force majeure* (paragraph 21). That phrase fell to be interpreted uniformly in all Member States because *force majeure* was a factor liable to be relevant in determining whether duties are chargeable and chargeability was to be identical in all Member States (paragraph 22). The court further held under reference to case law in other areas of Community law that *force majeure* was not limited to absolute impossibility but had to be understood in the sense of abnormal and unforeseeable circumstances, extraneous to the operator concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided (paragraphs 22, 23 and 31). Thus, *force majeure* contained both an objective element relating to abnormal circumstances extraneous to the trader (that is to say objectively outside the authorized warehousekeeper's control or situated outside his sphere of responsibility), and a subjective element involving the trader's obligation to

guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices (paragraphs 24, 37 and 40). For the purposes of the relevant provisions of the Directive, excise duty became chargeable only at the time of release for consumption or when shortages were recorded. Release for consumption also meant any departure, including irregular departure from a suspension arrangement (paragraph 28). Excise duty is, as a general rule, chargeable on losses and shortages. The *force majeure* exemption fell, as a derogation, to be strictly construed (paragraph 30). Moreover, absolute liability should not be placed on an authorised warehousekeeper for loss of products which are subject to a suspense arrangement (paragraph 32).

101. *Ann BordBainne*, relied upon by HMRC, concerned the sale of butter from Intervention stock to a business in the USSR. However, the USSR authorities changed their quality standards, which the butter acquired by *Ann BordBainne* did not meet. They claimed that the contract could not be fulfilled due to *force majeure* and sought release of its security from the Intervention Board who refused. *Ann BordBainne* sued them for recovery of the security provided. On a reference, the ECJ held that the concept of *force majeure* had to be understood in the sense of abnormal and unforeseeable circumstances outside the control of the trader concerned, the consequences of which in spite of the exercise of all due care could not have been avoided except at the cost of excessive sacrifice (paragraph 11). The court concluded that what had occurred was a usual commercial risk (paragraph 13). Changes in the rules of an importing state had to be anticipated (paragraph 16); and a prudent trader would insert an appropriate clause in his contract or take out insurance. What occurred therefore did not constitute *force majeure (*paragraph 17).

102. What emerges from *SPMR* and *Ann BordBainne*is that exemption is to apply where the consequences of abnormal and unforeseeable circumstances outwith the control and sphere of responsibility of the authorised warehousekeeper occur despite the exercise by him of all due care, and lead to *losses* (within the meaning of Art. 14.1 of the 1992 Directive) occurring under suspension arrangements. The fraud of Tariq/Direct Plus constitutes abnormal circumstances. These were outwith the control and sphere of responsibility of Butlers. The fraud and consequent disappearance of the goods was entirely unexpected and unforeseen having regard to the trading relationship with Tariq/Direct Plus. Whatever reasonable assessment of the potential risks Butlers could have made, there was no further appropriate or effective step which they could reasonably have taken to avoid those risks, whether at the cost of excessive sacrifice or otherwise.

103. Nevertheless it seems to us that while unforeseen the events which occurred were foreseeable. Fraud is an inherent risk in intra-Community movement of excise goods. Accordingly, had the failure of the goods to arrive at their destination through fraud constituted a *loss* within the meaning of Art. 14.1 of the 1992 Directive, we would have found it difficult to conclude that the loss was attributable to abnormal and unforeseeable circumstances and thus to *force majeure.*

104. As for ***Regulation 7 of the 2001 Regulations (proportionality and legal certainty)*** it is clear that in the exercise of the powers conferred on them by

Community Directives, Member States must respect the general principles of law that form part of the Community legal order, including the principles of proportionality and legal certainty (*Netto* paragraph 18). Thus, subject to the terms of the particular Directive under scrutiny, effective measures to preserve the rights of the public exchequer must not go further than is necessary for that purpose (*Netto* paragraph 20; *VOM* paragraph 24; *Telios* paragraphs 45 & 52-53- VAT cases; *Heintz v LandewijckSarl v Staatssecretaris van Financien* C-494/04 2006 ECR 1-5381 paragraphs 42-46; *Europlus Trading Ltd v HMRC* 2011 UKFTT 635 (TC) paragraph 110 - both excise duty cases).

105. Regulation 7 imposes strict liability upon a warehousekeeper even though he has taken all due care or exhibited an even higher standard. The question is whether that Regulation goes beyond the purposes of the 1992 Directive and thus infringes the general principle of proportionality. If it does, then unless it can be given a sympathetic construction complying with the general principle of proportionality, it must be disapplied.

106. In *Netto* (a VAT case), goods were supplied to nationals of non-member countries who were able to show proof of export outside the Community on the occasion of non-commercial trips. Such supply was, subject to certain conditions, VAT exempt. However, a substantial proportion of the goods were, unknown to the appellant, supplied to Polish nationals who were fraudsters using counterfeit forms. The conditions for exemption were thus not met. The tax authorities assessed *Netto* to the VAT due. The national court rejected *Netto's* appeal for exemption. The European Court of Justice held that the relevant provision of the Sixth Directive had to be interpreted as **not** precluding exemption from VAT where the taxpayer was not, even with the exercise of due commercial care, able to recognise that these conditions were not met, because certain documents had been forged. The sharing of the risk between the tax authorities and the supplier following a fraud by a third party must be compatible with the principle of proportionality. That principle will not be met where the tax regime imposes the entire responsibility for payment of the VAT on the supplier regardless of whether he was involved in the fraud. Where the supplier has no influence over the acts of the fraudster, it would be disproportionate to hold the supplier liable for the shortfall in tax. It is not contrary to Community law to require the supplier to act in good faith and take every reasonable step to satisfy himself that he is not participating in tax evasion. It would also be contrary to the principle of legal certainty if the supplier has been presented with the prescribed documents entitling exemption, and it subsequently transpires that, unknown to the supplier, the conditions for exemption were not, in fact, met (see paragraphs 19-26).

107. At paragraph 18, the Court observed

> …in the exercise of the powers conferred on them by the Community directives, Member States must respect the general principles of law that form part of the Community legal order, which include, in particular, the principles of legal certainty, and proportionality and the principle of protection of legitimate expectations.

Accordingly, Member States have to employ means which cause the least possible detriment to the objectives and principles laid down by Community legislation. This

has to be read in the light of the background of the obligation of Member States to lay down the conditions for the application of the exemptions for the purpose of preventing any evasion avoidance or abuse. Legitimate measures adopted to preserve the rights of the public exchequer as effectively as possible, must not go further than necessary for that purpose. The Court, in effect, held that in the VAT regime good faith and the exercise of due care was a good defence against the adverse VAT consequences of fraud. The VAT regime was distinguished from the different structure, object and purpose of the Community regime on the levying of customs duties (paragraph 28). However, what the Court appeared to have in mind at paragraph 28 was case law relating to the imposition of customs duty on goods imported from outside the European Union. That can be seen from the Opinion of the Advocate General in *Teleos*, at paragraphs 78-82, and paragraphs 56-57 in the Judgment of the Court, referred to below.

108. In *R (Teleos plc & ors) v C&EC* 2008 QB 600, the European Court of Justice held that the same general principles of law which form part of the legal order of the European Union applied to the VAT regime in relation to intra-Community supplies between Member States (see paragraphs 45, 46, 48, 50, 52, 53, 56, 58, 65, 66, 68 and 73.2). It did so in the context of provisions of the Sixth (VAT) Directive which required Member States to lay down the conditions for the application of the exemption of intra-Community supplies of goods (paragraph 45). The case concerned the sale of mobile phones in the UK to Spain, which would be exempt from VAT. The purchasers produced false documents which the tax authorities initially accepted; when the fraud, of which the supplier was entirely innocent, was discovered, the tax authorities demanded VAT from the supplier on the basis that as the goods did not leave the UK, the supply was not exempt.

109. *VOM* was a tax warehousekeeper. Its customer stored petroleum products at the warehouse. The customer was declared insolvent. Some of its products had been sold and released. The customer failed to pay the VAT due and the tax authorities charged *VOM* for it on the basis that they were jointly and severally liable under national legislation. *VOM* had acted in good faith without fault and argued that imposition of liability offended the principles of proportionality and legal certainty. The European Court of Justice applied those principles.The Court held that the unconditional liability of an authorised tax warehousekeeper (bound by the specific obligations referred to in the 1992 Directive) under national legislation, without allowing *VOM* to escape liability by providing proof that they had nothing whatsoever to do with the acts of the person liable to pay the tax, was contrary to the principle of proportionality (paragraph 24). The Court noted that it would not be contrary to European law to require *VOM* to take every step which could reasonably be required of them to satisfy themselves that the transaction being effected did not result in his participation in tax evasion (paragraphs 26-29). In *VOM*, the warehousekeeper was not primarily liable to pay the VAT in question (see paragraph 24).

110. *Europlus* was a complex excise duty drawback claim, ie a claim by a trader claiming to export eg beer to France on which duty has been paid and which HMRC wrongly refuse to refund. One of the issues related to whether the contention that the European principle in relation to the need to transpose Community Directives into

clear and proportionate domestic legislation, with any retrospective effects limited to what could be justified as strictly necessary extended to high level policy decisions affecting the overall application of the principles rather than just to primary and secondary legislation (paragraph 106). The Tribunal was clear that the principle applied to the actual enactment of legislation and concluded that it also applied to the policy to be followed in applying Community measures such as the drawback regime (paragraph 109). The Tribunal referred to *Mulligan v Min of Agriculture* 2002 ECR 1-5719 where it was stated that *where a Community regulation allows the Member States a choice between various methods of implementation, they must exercise their discretion in accordance with the general principles of Community law.*

111. *Garrett Trading* might be thought to run contrary to the view that general principles of European Union law apply in an excise duty context. The facts were similar to the present appeals except that the assessments were levied against the owner of the goods (also Glens vodka and High Commissioner whisky) which disappeared en route from an English tax warehouse to Germany, somewhere in the UK (paragraph 18). The Tribunal was of the view that the liability of the guarantor to excise duty was strict unless the exception in Art. 14 of the 1992 Directive applied, which they held it did not (paragraph 19). The Tribunal observed, at paragraph 20, that both Art. 20 of the 1992 Directive and Regulation 7 of the 2001 Regulations seemed to assume that the guarantee was sufficient to cover the duty, and that, in principle, it would be expected that the liability of a person (who did not cause the occurrence of the excise duty point) which was based solely on the fact that he arranged the guarantee would be limited to the guaranteed amount; and that, if liability were to exceed that amount, clearer words than those in Regulation 7(1) would be expected. This echoes the reservations of Lord Walker of Gestingthorpe in *Greenalls* at paragraph 39).

112. In addressing an argument for the appellant in *Garrett Trading* based on *Telios,* the Tribunal distinguished *Telios*on the facts but also expressed the view that *Telios* would have been decided differently had it related to excise duty. The reason given by the tribunal was that *Excise duty has its own rules that require a guarantee to cover the risks inherent in intra-Community movement. The Directive's exceptions to the strict liability of a warehousekeeper in Art. 14 are extremely limited and comprise only fortuitous events or force majeure, and losses inherent in the nature of the products during production and processing, storage and transport. None of these is applicable here.*

113. Although not cited to us, we have identified that in *Garrett Trading Ltd (No 2) v HMRC* 2008 3 CMLR 42 the Tribunal resolved the issue as to whether a person's liability to pay duty under Art. 20 of the 1992 Directive as a person who had guaranteed payment of the duty in accordance with Art. 15(3), was limited to the amount of the guarantee. The Tribunal held that it was not so limited, following the decision but not all the reasoning in an earlier Tribunal decision (*Anglo Overseas Ltd v HMRC* (2008) Excise Decision 01090 February 27, 2008). The view of the Tribunal in *Garrett No 2* was that having regard to Arts. 13, 15 and 20 of the Directive, there had to be a primary obligant whose liability was guaranteed by a secondary obligant. Art. 20 established that the primary obligant was the person who provided the

guarantee in Art. 15(3). That person had a dual role, firstly as the primary obligant (or principal debtor), and secondly as the person who had to provide security in the form of a guarantee from a secondary obligant (or cautioner). That was consistent with Regulation 7(1) of the 1992 Regulations which placed the primary obligation on the person shown in the administrative document as having arranged for the guarantee. The view that the warehousekeeper's liability is not limited to the amount of security specified in the guarantee provided by him has been followed in *Jigsaw Wholesale Ltd v HMRC* 2010 UKFTT156 (TC) at paragraphs 169 and 170; the view was expressed that liability was strict under the legislation (paragraph 172). We do not rely on these decisions but note that they are consistent with the conclusions which we reach below.

114. Butlers submit that the Tribunal in *Garrett* was wrong in law in the passage quoted. The Tribunal was not referred to *Heintz*. There, a Dutch tobacco wholesaler applied to the tax authorities for excise stamps; the packages of stamps were entrusted to its agent Securicor, but went missing in transit. The tax authorities refused to reimburse the amount paid for the stamps, although under national law reimbursement was authorised where the stamps had been lost as a result of accident or *force majeure*. A question arose as to the compatibility of the national legislation with Arts. 6(1), 14 and 22 of the 1992 Directive. The European Court of Justice held that the consequence of disappearance had been left by the Directive to the Member States. The Directive did not preclude Member States from laying down national rules which, in a case where tax stamps went missing, placed the financial responsibility for the loss of those stamps on the purchaser (paragraph 41). It was expressly held that such national rules could not be regarded as contrary to the principle of proportionality (paragraph 42). The national rules contributed to the achievement of the aim of preventing fraudulent use of the stamps and did not exceed what was necessary to pursue that objective as they did not exclude the possibility of reimbursement in other situations such as accident or *force majeure* (paragraph 44 and 46).

115. *Heintz* seems to us to be clear authority for the proposition that the supervening principles of European law are applicable in the context of excise duties and that that principle requires national legislation not to go beyond what is necessary in pursuit of legitimate objectives. However, it tells us little about the compatibility of Regulation 7(1) of the 2001 Regulations with the 1992 Directive.

116. *Greenalls* was decided under the 1992 Regulations. The facts were similar to the present appeals. A large quantity of vodka was dispatched from a UK tax warehouse under an excise duty suspension arrangement destined for tax warehouses in Spain and Belgium. The goods were fraudulently diverted and never reached their destinations. HM Customs assessed the warehousekeeper as being liable for the excise duty. It was held, in the House of Lords, that the excise duty point arose when the goods were fraudulently diverted (on the basis that there was an irregular departure and a release for consumption - paragraph 12) and that the warehousekeeper was liable for the duty. An argument based on reasonableness was advanced before and rejected by Jacob J in the High Court (paragraph 17) and was considered by Lord Hoffmann, who described the argument based on reasonableness as a *broad*

equitable argument (paragraph 24), and said that Jacob J had *rightly* rejected it. Lord Hoffmann found the judge's reasoning convincing, namely that the Commissioners did not have to investigate the extent to which the warehousekeeper was to blame; he had a right of recourse against those primarily responsible by virtue of the joint and several liability created by the Regulations; he could also reduce the commercial risk by requiring a bond or guarantee (paragraph 17).

117. Issues of proportionality were not discussed at all. Nor were any of the cases cited to us considered by the House. Broad arguments based on what may or may not be reasonable are not the same (although there may be some overlap) as the overarching general principle of proportionality which forms part of European law. In our view, it would be dangerous to conclude that *Greenalls* has anything to say about proportionality. Moreover, there was no discussion of *force majeure* as counsel for the taxpayer pointed out in *Garrett Trading* (at paragraph 16). Nevertheless *Greenalls* does support and provides a rationale for imposing primary liability on the warehousekeeper.

118. HMRC, when their submissions are carefully analysed, do not resist the proposition that the principle of proportionality operates in the context of excise duty. Their argument is that the 1992 Directive expressly provides for strict liability on the provider of the guarantee (not the actual guarantor) subject only to Art. 14 exemptions. The sharing of risk is largely determined by the 1992 Directive as one of its aims. That, they argue, is the nature of the structure of the Directive. Accordingly, they say that the scope for the principles of proportionality and legal certainty to attenuate that liability is negligible or non-existent. Applying the principle of proportionality, as Butlers urge, to relieve them of liability, would subvert the aims or objectives of the 1992 Directive. The Directive has determined how risk is to be shared between taxpayer and the tax authorities.

119. We return therefore to the Directive to see whether this submission is well founded because if it is, it simply destroys Butlers' whole case on proportionality.

120. Art. 20 provides that where an irregularity has been committed in the course of a movement involving the chargeability of excise duty, the excise duty is due in the Member State where the irregularity was committed, from the person who guaranteed payment of the excise duties in accordance with Art. 15(3). There is no doubt that an irregularity occurred in the course of a movement involving the chargeability of excise duty. There is no doubt that the duty is due in the UK. The duty is due from the person who guaranteed payment of the excise duties in accordance with Art.15(3). Art. 20 plainly allocates the risk of liability to that person, where there is an irregularity.

121. Art. 15(3) says that the guarantee is to be provided by the authorised warehousekeeper of dispatch, or if need be by a guarantee jointly and severally binding on both consignor and the transporter. Butlers were the authorised warehousekeeper of dispatch. No guarantee was provided by any other party. The only exception to this regime in the Directive is Art. 14, which we have already considered and held that it does not apply to diversion fraud. The combination of Arts.

20, 15(3), 13 and 14 sets forth a clear allocation of risk and the exemptions from it. Domestic legislation which accurately transposes these provisions into national legislation cannot be said to be contrary to the principle of proportionality.

122. Regulation 7(1) of the 2001 Regulations implements the Directive in part. It deals with the circumstance where an irregularity has occurred and an excise duty point has arisen. There is no doubt that the facts disclose the occurrence of an irregularity. There is no doubt that the excise duty point is the time when the goods were removed from Butlers' tax warehouse (Regulation 4(2)).

123. In those circumstances, Regulation 7(1) imposes liability on the person shown as the consignor on the AAD, or, if different, the person shown in Box 10. Here, liability is imposed on Butlers.

124. In what respect does Regulation 7(1) fail to implement the risk allocation set forth in the 1992 Directive? The only respect in which it fails to do so relates to the exemption for fortuitous events and *force majeure* for which provision is made in Art. 14. Nor is such provision made elsewhere in the Regulations. That is not disputed and we have already held that Art. 14 does not apply to the facts of the appeals.

125. If Regulation 7(1) implements the risk allocation set forth in the Directive, in what respect can it be said that it contravenes the European principle of proportionality? In spite of the detailed submissions advanced on behalf of Butlers, we cannot identify any respect in which the principle of proportionality is offended. The essential argument made by Butlers was that there was no sharing of the fiscal consequences of fraud between Butlers and the tax authorities. That is true but that is the consequence of the salient provisions of the 1992 Directive. Stripped to its bare bones, Butlers' argument is that the allocation of risk set forth in the Directive is unfair and disproportionate. That is not an argument to which we can give effect. On this short basis, this second branch of the appeal must also fail.

126. We should add that while the cases cited by Butlers vouch the proposition that Member States must observe the general principles of proportionality and legal certainty when implementing Directives, they do not support the argument that the express aims or objectives of a Directive can somehow be emasculated or diluted by the application of that principle.

127. Our attention was also drawn by HMRC to a number of differences between the VAT regime and the excise duty regime. However, we do not see these differences as critical for the purposes of the proposition that the principle of proportionality is applicable to the excise duty regime. It is and HMRC accepts that it is. What is important is the identification of the aims and objectives of the particular part of the Directive under scrutiny and a consideration whether domestic legislation goes beyond what is strictly necessary to implement those aims and objectives. In some cases it will be apparent that the domestic legislation does go beyond what is strictly necessary in the absence of a *due care* or *circumspect trader* exemption. Those

exemptions will be required if the Directive under scrutiny does not impose a strict allocation of risk on the taxpayer.

128. Our conclusions are consistent with the underlying theme of fiscal legislation, noted by Advocate General Kokott in *SPMR*, that the distribution of risk of fiscal liability generally relies on a division into spheres of control rather than compliance with duties of care. A similar point was made by the Vice Chancellor in *Re Arena Corporation Ltd 2*004 EWC Civ 371 at paragraph 28 (quoting Lindsay J in *Re Jack Baars Ltd* 2004 EWHC 18), and in *Greenalls* at paragraphs 17 and 18. Thus, the risk of diversion fraud involving those on whose behalf Butlers willingly acted as consignor falls within the risk allocated by the 1992 Directive and Regulation 7(1), to Butlers.

129. As we understood Butlers' arguments, their case on legal certainty stood or fell with the arguments based on proportionality. Very little was said about it in closing submissions or in their written reply to HMRC's written submissions. It must therefore fall. We have to confess that we had some difficulty in following Butlers' arguments on the question of legal certainty. The fault may be ours, but insofar as we understood those arguments, we had difficulty in seeing how they demonstrated that the principle of legal certainty was infringed so as to create an argument separate from the argument based on proportionality.

130. Finally, we should add that (1) we did not find it necessary to discuss any of the other cases cited to us, and (2) s157 CEMA mentioned in argument, does not seem to us to be of direct relevance to the arguments on proportionality in relation to Regulation 7 of the 2001 Regulations and the 1992 Directive.

131. We reach our conclusion with regret as we have found on the facts that Butlers were entirely innocent and did all that could reasonably be required of them in terms of the exercise of due care. Liability for the assessments may have severe financial repercussions for Butlers. It is to be hoped that HMRC and Butlers are able to secure full or substantial recovery from Direct Plus and/or McKillop.

Summary of Decision on the merits of the appeals by Butlers

132. Butlers did all that could reasonably be expected of them. Whether one describes this conclusion as all due commercial care having been taken, or all the due diligence of a circumspect warehousekeeper, does not matter. They are all different ways of expressing the same notion, namely that Butlers acted properly, carefully, reasonably and in good faith throughout.

133. What happened to the consignments of excise goods in 2007 did not constitute *losses* within the meaning of Art. 14.1 of the 1992 Directive, which is the first ground of appeal. Butlers' first ground of appeal must therefore be dismissed.

134. It is common ground that Art. 14.1 of the 1992 Directive has not been transposed into the domestic law of the United Kingdom, and that it has direct effect.

135. Had the failure of the goods to arrive at their destination through fraud constituted a *loss* within the meaning of Art. 14.1 of the 1992 Directive, we would have found it difficult to conclude that the loss was attributable to abnormal and unforeseeable circumstances and thus to *force majeure.*

136. There is no doubt that an irregularity occurred in the course of a movement involving the chargeability of excise duty. There is no doubt that the duty is due in the UK. The duty is due from the person who guaranteed payment of the excise duties in accordance with Art. 15. 3. Art. 20 plainly allocates the risk of liability to that person, where there is an irregularity.

137. The combination of Arts. 20 and 15(3), 13 and 14 sets forth a clear allocation of risk and the exemptions from it. Domestic legislation which accurately transposes these provisions into national legislation cannot be said to be contrary to the principle of proportionality.

138. The only respect in which Regulation 7(1) fails to implement the risk allocation set forth in the 1992 Directive relates to the exemption for fortuitous events and *force majeure* for which provision is made in Art. 14.

139. What is important is the identification of the aims and objectives of the particular part of the Directive under scrutiny and a consideration whether domestic legislation goes beyond what is strictly necessary to implement those aims and objectives.

140. We cannot identify any respect in which the principle of proportionality is offended. Butlers' second ground of appeal must therefore be dismissed.

The Appeal of Roy McKillop

141. Mr McKillop's presence in these proceedings has been intermittent. Latterly, his professional advisers withdrew from acting. He attended on the first day of the substantive hearing and was allowed to give evidence even though he had not complied with the usual procedural directions. After giving evidence, he departed and took no further part in the proceedings. There are therefore no submissions from Mr McKillop to which HMRC can respond. We have already commented on the credibility and reliability of his evidence.

142. In any event, it is clear on the facts as we have found them to be, that McKillop was aware of the diversion of the goods from the first consignment and took no steps to make enquiries or to alert either Butlers or anybody else as to what was taking place. At no stage in these appeals, until he gave evidence on oath, did he concede that the goods were not delivered outwith the UK, contrary to his Grounds of Appeal which he disproved as soon as he gave evidence. We consider that it is a reasonable inference from the circumstances presented to us that he was aware of and made a material contribution to the fraudulent diversion of the goods. In our view, that is sufficient to conclude, as we do, that he caused the occurrence of the excise duty points resulting from the application of Regulation 4(2) of the 2001 Regulations.

143. In these circumstances, Roy McKillop is liable to pay the duty in respect of the five consignments to which the appeals relate. He is jointly and severally liable with Butlers and Direct Plus to do so in terms of Regulation 7(2) of the 2001 Regulations. We accordingly dismiss Roy McKillop's appeal.

The Appeals of Direct Plus Distribution Limited

144. Direct Plus were neither present nor represented at the substantive Hearing. There are therefore no submissions from Direct Plus to which HMRC can respond.

145. In any event, it is clear on the facts as we have found them to be that Direct Plus or Tariq (acting as its agent and/or director) procured the dispatch of its goods to ostensible receiving warehouses who had no knowledge of these goods or arrangements. The goods were fraudulently diverted. Tariq has been convicted of conspiracy to evade excise duty arising out of the circumstances to which the assessments appealed against relate. It is an inescapable inference (even without the conviction), and if not inescapable, a reasonable inference that Direct Plus caused the occurrence of the excise duty points resulting from the application of Regulation 4(2) of the 2001 Regulations. In these circumstances, Direct Plus is liable to pay the duty in respect of the five consignments to which the appeals relate. Direct Plus is jointly and severally liable with Butlers and McKillop to do so in terms of Regulation 7(2) of the 2001 Regulations. We accordingly dismiss the appeals of Direct Plus.

Expenses

146. HMRC requested, at the end of the second day of the three days allocated for these appeals, and after Mr Ghosh had concluded his closing submissions, that proceedings should be adjourned instead of resuming the following day, and that HMRC be allowed to lodge written submissions in response to Mr Ghosh's closing address. As noted above, the Tribunal agreed, albeit with some reluctance. Mr Francis took full advantage of the seven days we gave him to produce his written submissions by lodging a comprehensive, and fully argued response to Mr Ghosh's powerful and detailed arguments on the facts and the law. Butlers produced a written reply to the HMRC written submissions, which includes an application for expenses, which was foreshadowed at the end of the Hearing. They have also produced a schedule of expenses as required by Tribunal Rule 10(3)(b).

147. Butlers argue that seeking the adjournment constituted unreasonable conduct within Rule 10(1)(b) as a result of which they have incurred extra legal expenses, essentially the cancellation of the third day, and the additional time considering and replying to HMRC's written submissions. In response, HMRC have lodged a Notice of Objection to the application for expenses. HMRC have also applied for the expenses occasioned by Butlers' application for disclosure lodged with the Tribunal on 1 February 2012. A Hearing on that application for disclosure took place on 17 February 2012. HMRC have lodged a schedule of expenses and Butlers have, in turn, lodged a Notice of Objection.

148. In support of the application for the expenses of the disclosure Hearing, HMRC assert that it came late in the day, was unjustifiably wide and was not properly argued or explained. The result was that three documents were produced, two voluntarily, although they were not what was sought or expected. The third had been produced subject to redaction. The Tribunal subsequently directed that the redaction be removed. In the event, none of these documents was relied upon or referred to at the hearing of the appeals.

149. In response, Butlers say that the fact that part of the application was refused does not mean that it was unreasonably made; the timing of the application could not be helped; it was HMRC who lodged the redacted document and then declined to produce an un-redacted version of it until ordered to do so. They also say that part of the expenses claimed (counsel's fees) are excessive.

150. In our view, while the Tribunal criticised the disclosure application, it cannot be said that the application was unreasonable. HMRC lodged a redacted document (presumably with some intention to found on it) and only produced the un-redacted version when ordered to do so. On that basis the application for disclosure was justified even although at the end of the day neither party founded on the un-redacted document. **We therefore refuse HMRC's application for expenses**, which seems to be a thinly disguised and ill-judged retaliatory strike in response to Butlers' application for expenses, otherwise it would have dealt with, in the lengthy and detailed written submissions which HMRC were allowed to produce.

151. As for Butlers' application for expenses, we agree that all the main points raised by Mr Ghosh in his closing submissions could have been anticipated. He addressed the Tribunal in detail on the question of proportionality and *force majeure*. HMRC had already responded to these lines of argument in their Statement of Case and in their Outline Submissions. Seeking an adjournment was not justified and constitutes unreasonable conduct of the proceedings within the meaning of Tribunal Rule 10(1)(b) rather than wasted expense as was also tentatively suggested. We therefore find HMRC liable to Butlers in the costs incurred by Butlers as a result of the adjournment of the proceedings on 28 February 2012, less any savings in expenses as a result of the Tribunal not sitting on 29 February 2012.

152. Butlers have lodged with their application a schedule of the expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such expenses should we decide to do so. It seems to us that it would be expedient for us to do so rather than remitting to the auditor of court for taxation. This will avoid unnecessary formality, further expense and delay.

153. We have also considered HMRC's Notice of Objection. HMRC have referred us to *Capital Air Services Ltd v HMRC* 2011 STC 617 at paragraph 31 for the proposition, which we accept, that taxpayers and their advisers cannot expect to recover from HMRC expenses which are disproportionate or unreasonable. HMRC also submit that engaging two counsel was excessive, and that various savings should be allowed for as a result of not sitting on 29 February 2012.

154. It appears that the bulk of the work carried out in preparing a reply to HMRC's lengthy submissions (44 pages - double spacing) was carried out by Mr Ghosh. The number of hours claimed and the rate charged are, in our view, reasonable. Junior counsel was also involved. Although the number of hours charged for considering Mr Ghosh's submissions and HMRC's submissions is not specified, the amount claimed seems to us to be, viewing matters generally, reasonable. We allow the sums claimed for these matters. We consider it reasonable for Butlers to have engaged senior and junior counsel in a case of this complexity and importance to them.

155. The solicitor from Paull & Williamsons has charged a restricted number of hours for perusing the HMRC submissions, circulating and instructing counsel; perusing the senior counsel's draft submissions and junior counsel's comments, and creating, intimating and lodging the final version. The hours spent and the rate charged seemed to us to be reasonable. We allow the sum claimed. We reject the suggested deduction for the solicitor's time on the third day. It is speculation suggesting that the hearing would have lasted six hours on the third day. Had we insisted in proceeding, we suspect that the HMRC submissions would have been much briefer.

156. However, two lawyers from Aegis Tax, 2 Stone Buildings, Lincoln's Inn, London, who also acted on behalf of Butlers, have charged a total of 15.25hrs (one at a rate substantially in excess of the rate charged by Paull & Williamsons) for work done on documents, communications with counsel and legal research.

157. While we do not dispute that such work was undertaken, we do not consider that it is reasonable that HMRC should pay for it over and above counsel's fees and the fees of counsel's instructing solicitor. We doubt whether such work would be allowed under formal taxation.

158. Junior counsel has charged a cancellation fee but senior counsel has not done so. We would have thought that both counsel would have been entitled to their day's fee for the third day. Accordingly, whether the case was completed in two days or three days, they would have been entitled to and Butlers would have been bound to pay the third day. Seeking a cancellation fee suggests that something less than the full day's fee is being demanded. Accordingly, that is a saving for which HMRC are entitled to credit. We cannot, on present information, determine the amount of any such credit.

159. Using the figures in the Schedule of Expenses, and applying them to the items we allow, produces a figure of £7,260. **We therefore summarily assess the expenses to which Butlers are entitled at the sum of £7,260 plus VAT less any credit arising from any saving in expenses of junior counsel's fees attributable to the Tribunal not sitting on 29 February 2012.**

160. If any such savings do arise and the parties cannot agree what they should be, then either party may apply to the Tribunal within 28 days of the release of this decision for a hearing to determine the amount of any such savings.

161. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRIBUNAL JUDGE

RELEASE DATE: 14 June 2012