[2020] UKFTT 464 (TC)

TC07939

Appeal number: TC/2017/05532

EXCISE DUTY – whether valid movement guarantee in place – no – whether in accordance with principle of proportionality – yes – whether discretion properly exercised – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RARTER LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MRS SONIA GABLE

Sitting in public at Manchester on 24 and 25 January 2019

Mr S Charles, Counsel for the Appellant

Ms Newstead Taylor, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against an excise duty assessment for £93,771.00 issued on 17 February 2017 and confirmed on review on 13 June 2017.

2. The issue in dispute is whether or not the correct procedure for export was followed and, if not, whether the assessment is disproportionate. There was no dispute as to the amount of the assessment.

Background chronology

3. The appellant is an excise warehouse business with premises in Leeds. The excise goods in question were owned by another business, SJ Brands (SJB), and stored at the appellant's premises.

4. 7 April 2016:

   (1) SJB advised the appellants that the excise goods in question were to be moved to a third party excise warehouse in France.

   (2) The appellants responded to SJB and advised that they could not provide a movement guarantee for the shipment as their guarantee was not large enough to cover the duty amount. The appellant stated that SJB would need to provide details and proof of an appropriate guarantee before the appellants could release the goods for transfer outside the UK.

   (3) Safe Cellars Ltd (SCL) emailed the appellants authorising the use of movement guarantee MGN 760M. Attached to the email was an "HMRC Movement Guarantee Check" dated 15 February 2016 which confirmed that the movement guarantee was valid and that it belonged to a company called ACP Freight Services Limited (ACP). SCL's own movement guarantee had been cancelled on 11 January 2016.

5. 8 April 2016:

   (1) The appellants completed the electronic documentation (eAD) on the Excise Movement and Control System (EMCS) stating that the transporter and guarantor for each load was SCL.

   (2) The goods were dispatched in two consignments, each consignment having its own ARC number. The carrier which collected the goods is shown on the consignment note as "R.D.V."

6. 11 April 2016: a report of receipt was received for each consignment.

7. 27 January 2017: As SCL's own movement guarantee had been cancelled some months before this movement of goods, HMRC wrote to the appellants asking them to provide evidence that a valid movement guarantee had been place in respect of the consignments when they were released from the warehouse within 14 days.

8. On 17 February 2017, as no response had been provided by the appellants, HMRC issued the assessment under appeal on that basis that, at the time of release of goods, the appellant did not have written confirmation from ACP that the guarantee could be used by the appellants.

9. On 23 February 2017, the appellants received confirmation by email from ACP that their movement guarantee had been used for the consignments to which the assessment relates.

10. Following correspondence between the appellant and HMRC, the decision was upheld on review.

Was there a breach of the requirement to have a valid movement guarantee in place?

Relevant law

11. Article 18 (1-2) of Council Directive 2008/118/EEC provides that:

> (1) The competent authorities of the Member State of dispatch, under the conditions fixed by them, shall require the risks inherent in the movement under suspension of excise duty be covered by a guarantee provided by the authorised warehouse keeper of dispatch or the registered consignor.
>
> (2) By way of derogation from paragraph 1, the competent authorities of the Member State of dispatch, under the conditions fixed by them, may allow the guarantee referred to in paragraph 1 to be provided by the transporter or carrier, the owner of the excise goods, the consignee, or jointly by two or more of these persons and the persons mentioned in paragraph 1.

12. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the 2010 Regulations) provide as relevant that:

> 5. Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.
>
> 6.—(1) Excise goods are released for consumption in the United Kingdom at the time when the goods—
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement …

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

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

(i) they are dispatched to one of the destinations referred to in regulation 35(1)(a); and

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

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

(a) dispatched from a tax warehouse to—

(i) another tax warehouse approved in relation to excise goods of that class or description;

…

39.—(1) Except for movements between tax warehouses which the Commissioners may specify in a notice, excise goods may not be moved under duty suspension arrangements unless—

(a) the risks inherent in the movement are covered by an approved guarantee provided by the authorised warehousekeeper of dispatch, the registered consignor or any other person the Commissioners may allow in accordance with paragraph (2) which secures such amount of the duty chargeable on the goods as the Commissioners may require; and

(b) the procedures in Part 6, Part 7, Part 8 or, as the case may be, Part 9 of these Regulations are complied with.

(2) Subject to such conditions as they may specify in a notice the Commissioners may allow the guarantee referred to in paragraph (1)(a) to be provided by —

(a) the transporter or carrier of the excise goods;

(b) the owner of the excise goods; or

(c) the consignee of the excise goods.

(3) In paragraph (1)(a) "approved" means approved by the Commissioners.

13. Pursuant to regulation 39(2), HMRC issued Excise Notice 197 which provides as relevant that:

10.2 Financial security for duty-suspended movements

Authorised warehousekeepers must make sure that financial security for the movement is in place before removing goods from their warehouse.

The movement security required for duty-suspended removals from an excise warehouse may only be provided by the:

- warehousekeeper of dispatch
- last owner of the goods whilst warehoused (not a duty representative)
- transporter - by transporter we mean someone who normally physically transports excise goods. It can also include someone appointed to act as the transporter who sub-contracts the actual transportation to another haulier. In this instance, while the transporter does not physically transport the goods themselves, they must:
    - have a direct connection with the goods being transported
    - have a permanent place of business or residence in the UK
    - be responsible for making sure that the goods arrive safely at the intended destination
    - invoice and receive payment directly for providing the transport

Please note that a transporter acting purely as a broker and who only receives commission or an arrangement fee for his transport services cannot provide the movement guarantee.

…

If the owner or transporter provides the security, the dispatching warehousekeeper must hold written confirmation from the principal confirming that the warehousekeeper may use their guarantee.

…

10.5 Checking the validity of guarantees

It is the dispatching warehousekeeper's or registered consignor's responsibility to make sure that the guarantee for the movement is given by one of the persons listed in paragraph 10.2 of this notice … You should confirm that the guarantee is given by one of these people before you complete the appropriate section of the eAD on EMCS. If you are not certain that the guarantee details given to you for the movement are valid, you should make enquiries of the owner or transporter to satisfy yourself that the guarantee given is appropriate for that movement. If you are not satisfied you should not accept the guarantee.

If you wish to check whether a guarantee is valid, then you should contact the Excise Liaison Office (ELO) and provide them with:

- the principal's name
- the amount of duty suspended on the movement
- the reference number of the guarantee

They ELO will tell you if the guarantee is valid and will keep a record of your request. If you make a written request, the ELO can make this record available to you. We may not disclose any further information.

> It is in your own interests that goods should not be released without a valid guarantee recorded on the eAD. If you do release the goods without a valid guarantee (or without permission to use that guarantee), then you as the warehousekeeper or registered consignor have not complied with your legal responsibilities and may be liable for the duty.

14. s12(1A) Finance Act 1994 provides as relevant that:

> … where it appears to the Commissioners–
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount due can be ascertained by the Commissioners,
>
> The Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

Appellant submissions

15. Mr Batchelor, director for the appellant, provided a witness statement and gave evidence at the hearing. He stated that he had not been personally involved in the dispatch although he had discussed the matter with the two members of staff who had been involved and had knowledge of the issues from the documentation and the correspondence with HMRC. He stated that:

(1) SDL was shown as the first transporter on the eAD as SJB had contracted with them to transport the goods;

(2) The eAD only has the facility to specify the consignor, transporter or owner of the goods as the guarantor. There is no ability to show the details of the actual transporter where the transport has been subcontracted to another company, and there is no facility to specify such a third party as the guarantor.

(3) SCL had advised the appellant that the goods would be collected. SCL's website stated that they had a number of haulage partners who could offer the use of their movement guarantees.

(4) In correspondence with HMRC, the appellant accepted that there may have been a technical breach of UK requirements and accepted that that could give rise to a civil penalty.

16. In cross-examination:

(1) He agreed that enquiries had not been made, and that they had assumed that SCL had sub-contracted the transport out but had not checked whether this was the case. They would not load the goods without some confirmation that the carrier was authorised to collect them.

(2) He also agreed that, in correspondence, ACP had not confirmed that they were a transporter for the relevant movement of goods nor that they had subcontracted the work to another company, nor that they had given permission for the use of their guarantee before the goods were moved.

(3) He agreed that there was no evidence that the value of ACP's movement guarantee had been checked.

(4) He confirmed that no signed receipt documentation had been received, nor any evidence of ferry or similar evidence of transport outside the UK. They had not checked that the seal was intact on arrival and had relied on the ECMS entries as to arrival of the goods. This was normal practice, there would not be a clean receipt on the system if the goods were not as stated, although he acknowledged that the system report of receipt was completed by the consignee.

(5) He did not know why the goods had gone out in two identical loads, although he thought they had probably come in to the warehouse in that way.

17. The appellants submitted that HMRC were incorrect to raise the assessment because:

(1) The appellant had ensured that financial security was in place for the movement before the goods were removed from the warehouse;

(2) The movement guarantee was provided by the transporter, ACP.

(3) In the circumstances, the appellants had written permission to use the movement guarantee.

(4) The goods were transported by ACP, using third parties to provide transport services.

18. The appellants further submitted that:

(1) The movement details requested by HMRC before goods are dispatched from a warehouse request only details of the "first transporter". The guarantor details requested require only the type and description of the guarantor (in this case, type 2 and description as transporter of goods)

(2) There is no option on the documentation for the warehousekeeper to enter details of any other transporter involved.

19. The appellant submitted that the requirements of statute and Excise Notice 197 had been met, as they had written confirmation of a movement guarantee from SCL before the goods were released and had, as required by statute, ensured that there was financial security for the movement. They also submitted that the owner of the guarantee, ACP, could authorise SCL to provide written confirmation of the guarantee.

20. The appellant argued that the position here could be distinguished from that in *Butler*, where the argument was that a duty suspension could be deemed to be in place from the circumstances. In this case, the appellant's position was that no deeming was required as all the requirements were actually met.

21. The appellant accepted that at the time that the eAD was completed, the appellant knew only that SCL was transporting the goods. They were not aware that the transport had been subcontracted to ACP. HMRC had not, prior to their skeleton argument, raised the question of whether ACP were a transporter in respect of the

movement; it was submitted that it was improper for HMRC to raise the point now when it had not been raised at review. The appellant acknowledged that the movement guarantee could have been fraudulently or incorrectly provided and accepted that, if that had been the case, there would have been a breach of the requirements. However, as the movement guarantee was valid and ACP had confirmed that it had been used for the movement of the goods in question, it was the appellant's contention that the substantive requirements of the legislation had been met. It was submitted that it was not appropriate to raise an assessment for a technical breach of the legislation.

HMRC submissions

22. HMRC submitted that there were two potential breaches of the legislation involved as either:

(1) no valid movement guarantee had been provided; or

(2) the appellant had no prior written permission to use the movement guarantee

23. For the movement guarantee to be valid, it must be provided by a transporter (in this context). SCL could not provide a valid movement guarantee as its guarantee had been cancelled.

24. HMRC submitted that the appellant had provided no evidence that ACP was a transporter in relation to this movement of goods and, therefore, could not show that there was a valid movement guarantee in respect of the movement of goods.

25. HMRC submitted, in the alternative, that the appellant had no written permission from ACP to use their movement guarantee and so could not rely upon it. The appellant's contention that SCL were acting as principal in an agency context and had provided written confirmation which authorised the use of ACP's guarantee was not relevant. The Excise Notice defines "Principal" as the person who arranges for a guarantee and uses it to provide financial security; that could only be ACP.

26. HMRC's witness, Officer Johnson, also confirmed that the report of receipt on the ECMS system is not absolute evidence that the same load was received.

27. HMRC submitted, in summary, that the appellant did not have any evidence that there was a valid movement guarantee in place when the eAD was completed. They had not undertaken basic checks on the movement guarantee check copy that they had been provided with. They had not complied with the requirements of Excise Notice 197 and therefore may be liable to excise duty on the release of the goods.

Discussion

28. The "movement details" recorded for both consignments state that the "transport arranger" is SJB, and the "transporter" is SCL. The "guarantee details" state that the movement guarantee is provided by the "transporter" which is again stated to be SCL. It was not disputed that SCL was a storage company, not a haulier.

The carrier is shown as "R.D.V." on the consignment note. There is no reference to ACP on any of the contemporaneous documentation.

29. In an email dated 22 February 2017, from the appellant to HMRC responding to HMRC's query as to the role of R.D.V., the appellant advises that "we were told [SCL] were collecting but then it got subbed out to another company".

30. On 23 February 2017, the appellant emailed SCL as follows: "we have had an enquiry … about two loads that were sent … using your movement guarantee as attached … please acknowledge you (*sic*) guarantee was valid for the movement as it was arranged by you". SCL replied the same day that the "bookings were done via haulier acp" and copied ACP into the email. Later that same day, ACP confirmed that their movement guarantee was used; the email chain shows that ACP had undertaken internal checks on the position and the appellant before replying.

31. We note HMRC's submission that the appellant has not shown that ACP were a transporter in respect of the movement of goods. A transporter has to meet certain conditions, including having a direct connection with the relevant transport and be responsible for the safe arrival of the goods, invoicing for the transport and receiving payments.

32. We note also the appellant's contention that HMRC had not queried ACP's status at any point substantially before the hearing, suggesting that they should be precluded from querying that status at the hearing. We note the point was raised in HMRC's skeleton argument and it is clearly a statutory requirement that the person providing the guarantee be one of a specified range of persons: the only capacity in which ACP could provide the guarantee in this case would have been as transporter. The burden of proof is on the appellant to show that the requirements – including the requirement that the guarantee be provided by one of the specified range of persons – has been met.

33. We consider that ACP were clearly involved in the movement in some capacity, but also note that Excise Notice 197 states that "A transporter acting purely as a broker and who only receives commission or an arrangement fee for his transport services cannot provide the movement guarantee."

34. It is regrettable that neither party produced any witness evidence from SCL or ACP as to the arrangements but, on the balance of probabilities, we conclude that ACP were a transporter for the purposes of Excise Notice 197. SCL were a storage business, rather than a haulier, and the correspondence states that the transport was booked "via haulier ACP" which we consider indicates that they had subcontracted the transport to ACP, who had engaged the carrier. That was also the appellant's understanding. There was no indication that ACP were acting only as broker between SCL and the carrier; ACP undertook internal checks before confirming that they were the guarantor for the two movements and we consider that their exercise of due diligence in making the response suggests that they would have been aware of the implications of providing such a confirmation.

35. HMRC submitted in the alternative that the appellant could not rely upon ACP's guarantee as they had no written confirmation from ACP that they could use the guarantee, as required by clause 10.2 of Excise Notice 197.

36. Having considered the evidence, we agree with HMRC that the appellant did not have the required written confirmation. The definition of "Principal" in the Excise Notice is clear and can only refer to ACP, and the wording of 10.2 also supports that. SCL's provision of a copy of the HMRC guarantee check is not written confirmation from ACP that the guarantee could be used by the appellant; SCL's email with the check makes no reference to ACP.

37. ACP did not provide the appellant with written confirmation that their guarantee could be used; in the email chain in February 2017, they only state that their guarantee "was used" and not that they had authorised its use to the appellant. The appellant's contention that ACP could have authorised SCL to provide written confirmation of the guarantee is, we consider, simply speculation: there was no evidence that they had done so.

38. Further, although Mr Batchelor's evidence was that SCL had advised the appellant that ACP would collect and move the loads, it was accepted in the hearing (and we consider that it is clear from the contemporaneous documents and the email chain set out above) that the appellants were not aware at the time of the release of the goods that ACP were involved.

39. The evidence before us showed that the appellant was only advised of the involvement of ACP in February 2017, some ten months after the goods were released from the warehouse. There was no evidence that the appellant had queried prior to release of the goods why the movement guarantee was being provided by ACP rather than SCL.

40. We find that, although the movement guarantee check provided by SCL showed that the guarantee belonged to ACP, the appellant was not aware that ACP were involved in the transport before the goods were released from the warehouse in April 2016 and, further, that they did not become aware of ACP's involvement until February 2017.

41. At the points in time at which the eAD was completed and when the goods were moved, therefore, we find that the appellant had been provided with a movement guarantee check which was two months old and which stated that it related to a company which we find that they had no reason to believe was involved with the movement of the goods. They took no steps to check that the guarantee was valid or validly provided: they had no confirmation (written or otherwise) from that company that they authorised the appellant to use their movement guarantee; they had no evidence that that company knew that a copy of its movement guarantee was being provided to the appellant by SCL. It was accepted in the hearing that the appellant also had no evidence that ACP's guarantee was sufficient to cover the movements.

42. It follows therefore that there was a breach of the specific requirements of Excise Notice 197 and the relevant legislation as the appellant, as dispatching warehousekeeper, had not obtained written permission from the guarantor to use the movement guarantee which had been provided and had not confirmed that the guarantor was in fact a transporter in connection with the movement of the goods, nor that the guarantee would in fact cover the movements.

43. The fact that, some months after the event, the guarantor stated that the guarantee had been used for the relevant movement cannot be interpreted as meaning that the appellant had complied with the requirements of the legislation at the time when they allowed the goods to be moved.

Whether HMRC's position is incompatible with EU law

Appellant's submissions

44. The appellant submitted that, if they had not complied with Excise Notice 197, HMRC's position is nevertheless incompatible with EU law as it means that a technical or administrative breach of the requirements will lead to a duty point on a strict liability basis. As such, there will be a double charge to excise duty, as there would be another duty point when the goods subsequently leave duty suspension. HMRC's interpretation of the provisions of Excise Notice 197 creates a maze of tripwires which do not prevent fraudulent or illicit activity but serve only to trip up companies engaged in legitimate business.

45. For example, if HMRC require that the written permission be given by the entity that holds the movement guarantee, that would lead to absurd results where a logistics group has separate entities, one of which holds the movement guarantee and another of which deals with bookings. Further, a warehousekeeper has no means of knowing whether and to whom a movement of goods has been sub-contracted and should be able to rely on the person identified as the transporter providing written confirmation that a valid movement guarantee is in place.

46. The appellant submitted that there had been substantial compliance with the requirements for a duty suspended movement, as the goods had been moved from one excise warehouse to another and that movement of goods was in fact covered by a movement guarantee. Any alleged breach of the rules could only be a technical breach of the provisions of Excise Notice 197.

47. The appellant submitted that the CJEU had established in *Polihim-SS EOOD v Nachalnik na Mitnitsa Svishtov* (C-355/14) ("*Polihim*") at §59 that the issue of proportionality needed to be considered where there had been only a technical breach of national rules. In that case, refusal of exemption on the basis that the consignee was incorrectly named, without checking that the actual consignee was entitled to the exemption, was a breach of the rule of proportionality.

48. It was submitted that the same principle applied in this case, that it would be a breach of the rule of proportionality for HMRC to be entitled to raise an assessment

where a valid movement guarantee was in place for the movement of the goods, and that there was no other irregularity in that movement of goods.

49. The appellant also relied on *ROZ-ŚWIT Zakład Produkcyjno-Handlowo-Usługowy Henryk Ciurko, Adam Pawłowski spółka jawna v Dyrektor Izby Celnej we Wrocławiu* (C-418/14) ("*Swit*"). In this case, the CJEU held that the principle of proportionality mean that national legislation could not impose a higher rate of excise duty for failure to provide information within a specified time where there was no doubt as to the intended (lower duty rate) use of the product. The CJEU noted that a fine might be appropriate for such errors.

50. It was submitted that the same principle applied here, that an error in dealing with formalities should not mean that the goods were not moved under duty suspension, where there was no indication that there had been any fraud as there was no indication that the goods had not been received into an excise warehouse in France. The appellant submitted that the appropriate sanction would be a fine, rather than the creation of a duty point.

51. The appellant further submitted that the CJEU decision in *Vakarų Baltijos laivų statykla' UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* (Case C-151/16) ("*Vakarų*") was relevant. In that case, the CJEU had similarly concluded that refusing exemption without checking whether the substantive requirements had been met was in breach of the principle of proportionality and went beyond what was necessary to ensure the correct and straightforward application of those exemptions and to prevent evasion, avoidance or abuse.

52. In summary, the appellant submitted that, although it was acknowledged that there could have been fraudulent activity, there was no actual fraudulent activity in this case. HMRC's contention that there was not enough evidence to conclude that the goods had been properly delivered was raised only in the hearing and there were no grounds to consider that the goods had not in fact reached their destination property. The report of receipt on the EMCS showed that the same type of goods had been received in France.

53. It was submitted that the CJEU has established that in the absence of fraud, a technical breach of national rules will not create a duty point. It was accepted that, if the appellant had made no effort to make sure that there was a guarantee in place or had accepted a fraudulent fax from a company that they had never heard of, then it could be reasonable that a duty point arose.

54. The appellant further submitted that:

> (1) HMRC's reference to *Greenalls Management Ltd v Customs and Excise* [2005] UKHL 34 ("*Greenalls*"), in support of the responsibilities of a warehousekeeper, could not override the requirement to consider the matter from the perspective of proportionality and not automatically raise an assessment. HMRC's argument was tantamount to an assertion of strict liability.

(2) The case of *Revenue and Customs v Butlers Ships Stores Limited (Tax)* [2018] UKUT 58 (TCC) ("*Butler*") was not relevant to this matter, as the warehousekeeper in *Butler* had failed to comply with all requirements of the Directive, such that the question of proportionality did not arise.

HMRC submissions

55. HMRC submitted there is no such thing as a "technical breach" of the requirements and that, per *Butler* which also considered *Pohilim* and *Zwit*, HMRC are required to raise an assessment where the requirements have not been complied with. *Butler* had similarly concluded that it was irrelevant whether or not the transport of the goods had actually been completed.

56. HMRC submitted further that all three cases quoted by the appellants concerned different Directives and different fact patterns:

(1) In all three cases, the excise goods were used for their intended use and there was no suggestion of fraud. In this case, HMRC did not accept that the goods in question had reached their intended destination; the report of a receipt was not evidence that the goods had actually left the UK and been received at the excise warehouse in France. There were unanswered questions about the goods movement, such as why it was in two identical loads, and why SCL had given ACP's movement guarantee without giving any indication why it was being used. The CJEU had had no concerns over the underlying transactions in the three cases mentioned, based on the evidence provided. The same cannot be the case here.

(2) The CJEU had made their decisions based on the specific facts of each case. There was no general finding that the national legislation was undermined by the principle of proportionality. In the case of *Zwit*, for example, the requirements of national law were found to be proportionate and only the penalty for breach of that national law requirement was considered to be disproportionate.

(3) Further, two of the decisions note that the relevant duty could be established on the basis of the evidence available at the time, that there was positive evidence that the lower rates of duty or exemption applied. That is, compliance with the substantive requirements had been established. The third decision, *Zwit*, notes that the national court had concluded that there had been substantive compliance with the requirements of the Directive.

57. HMRC submitted that the appellant's position was very different: this was not a "mere technical breach" such as a failure to provide a list by a certain time or listing an intermediary as consignee where an end user is exempt. Instead, the appellant's failure was more fundamental and undermined the structure of the excise duty regime as they had allowed the release of goods without confirmation that a valid movement guarantee was in place.

58. HMRC submitted that the relevant Directive in this case is concerned with the movement of dutiable goods and the risk to revenue of national authorities: the

purpose of the relevant EU and national legislation is to prevent evasion, avoidance and abuse of appropriate duties. Article 18 provides member states with discretion to set the conditions under which goods can be moved under duty suspension where a movement guarantee has been provided by a person other than the warehousekeeper or the registered consignor.

59. Excise Notice 197 is enacted in pursuit of that discretion and is intended to ensure the integrity of movement of goods in duty suspension, and preventing abuse, and the measures included are a proportionate means of achieving that aim. Warehousekeepers, such as the appellant, are given benefits under the legislation (and the Excise Notice) and so are required to ensure that the integrity of the system is maintained. In this context, they are required to ensure that movement guarantees are valid and that the guarantor has given permission for the guarantee to be used. HMRC referred to the decision in *Greenalls* which noted that being a warehousekeeper "is a privilege which carries obligations".

60. A failure to comply with the requirements would mean that goods could be dispatched without a guarantee in place, or that the guarantor had no knowledge that the guarantee had been used. Such failure could result in an avoidable loss of duty. Accepting third party authorisation another third party's movement guarantee would undermine the integrity of the system.

61. HMRC submitted that the appellant's contention that a strict interpretation of the provisions would lead to absurd results for groups was incorrect. Clause 10.4.3 of the Excise Notice allows for subsidiary and associated companies to be covered by a parent company guarantee. The contention that a warehousekeeper may not know to whom transport has been subcontracted was also not sustainable: the onus is on the warehousekeeper to make enquires if there is any doubt about the validity of the guarantee.

Discussion

62. *Polihim* states (at §45) that it is necessary to consider the context in which the provision of EU law occur, and the objects of the rules of which it is part.

63. Article 18 of Council Directive 2008/118/EEC (the Directive) requires that "the risks inherent in the movement under suspension of excise duty be covered by a guarantee provided by the authorised warehouse keeper of dispatch or the registered consignor"; by derogation, the guarantee may be provided by the transporter or carrier.

64. Although the wider object of the Directive is to allow goods to be moved within duty suspension, we consider that the object of the particular rules in the context here is, as stated in the Directive, to ensure that the risks involved in the movement of excise goods under suspension are minimised.

65. The Directive requires that the warehousekeeper or consignor provide a guarantee or, by derogation, that member states may allow a guarantee to be provided

by (inter alia) a transporter. We note that recital (16) of the Directive notes that it is necessary to lay down requirements to be complied with by authorised warehousekeepers; recital (18) notes that the movement of excise goods under suspension should be allowed; recital (19) states that "in order to safeguard the payment of excise duty … member states should require a guarantee, which should be lodged by the authorised warehousekeeper of dispatch or the registered consignor … or another person involved in the movement, under the conditions set by the member state".

66. This is enacted in Article 18, which requires that the risks inherent in the movement of goods under duty suspension between member states be covered by a guarantee provided by the warehousekeeper or consignor or, by derogation, by the owner, the consignee, the transporter or the carrier, if the national authorities so permit. The Directive leaves it to member states to determine how the requirements of Article 18 shall be fulfilled.

67. Article 17 specifically requires that an authorised warehousekeeper comply with the requirements laid down by the member state in whose territory it is situated; Article 16 entitles member states to set out the conditions for authorisation of warehousekeepers for the purposes of preventing any possible evasion or abuse. The decisions of the Upper Tribunal in *Butler* (at §23) and the House of Lords in *Greenalls* (at §17) confirm, to the extent that it needs confirming, that the benefits provided to warehousekeepers come with a responsibility to ensure that the requirements of the duty suspension regime are complied with.

68. We note the appellant's submissions that HMRC's interpretation of *Greenalls* was tantamount an assertion of strict liability: we consider that the decision in *Greenalls* was exactly that. The House of Lords held that the warehousekeeper in that case was liable to excise duty where goods dispatched from their warehouse were fraudulently diverted after leaving the warehouse even though the warehousekeeper was "utterly blameless". The House of Lords specifically rejected the argument that the regulation was not intended to impose a liability in such circumstances (§24).

69. In each of *Polihim* and *Swit* and *Vakarų*, the relevant taxpayers had enough information at the time of the release of the goods to know that they met the requirements of the relevant EU legislation. It should be noted that each of these cases was considering the application of Article 14 of the Directive and not Article 18. In each case, the relevant irregularities related to national law requirements setting out the conditions under which exemption from duty could be given; Article 14 requires member states to take measures to prevent abuse of the exemption but does not provide details of any such particular measures to be taken.

70. In contrast, Article 18 states that member states shall require that goods moving under suspension of duty are covered by a guarantee; member states are able to set the conditions for such guarantees to be provided but are not given any freedom as to whether such guarantees should be provided in respect of the cross-border movement of goods such as those involved in this case.

71. The effect of the appellant's position is that they consider that there is no breach of the Directive if the warehousekeeper does not confirm before the movement of goods whether there is a valid guarantee to cover that movement, provided that a guarantee is later established to have been in place. This approach would render the position of the guarantee requirements in the Directive at the point of the movement of goods somewhat akin to the condition of Schrödinger's cat: potentially both compliant and non-compliant until observed.

72. Given that the purpose of the requirements is to "cover the risks inherent in the movement under suspension" (Article 18) and to "safeguard the payment of excise duty in a case of non-discharge of the excise movement" it follows that it cannot be correct that the Directive has been complied with where goods are purported to be moved under duty suspension in conditions where compliance with the guarantee requirements is unknown. We consider that it would defeat the purpose of the EU legislation if it were to be interpreted as meaning that there is no irregularity where the existence of such guarantee is confirmed only after the goods have been moved.

73. As already noted, the information held by the appellant at the time of release of the goods could not have enabled the appellant to conclude that the requirements of the Directive were met: the movement guarantee provided to them did not belong to a person known to the appellant to be the transporter or other person authorised by HMRC to provide a guarantee in respect of the particular movement. They had no written confirmation (or any confirmation) from the guarantor that they had authorised the use of the movement guarantee in respect of that movement of goods. They had no confirmation that the guarantee value was sufficient to cover the movements; indeed, we note that the evidence was that ACP's guarantee had never been confirmed to be sufficient to cover the movements.

74. In contrast to the position in each of *Polihim* and *Swit* and *Vakarų*, therefore, we find that the failure in this case means that the requirements of the EU legislation have not been met and, further, that the provisions in Excise Notice 197 requiring that the validity of the guarantee be confirmed before completing the eAD are not in breach of the principle of proportionality.

75. The appellant stated in the hearing that their contention was that it was HMRC's application of Excise Notice 197 which was disproportionate, rather than the notice itself, in that strict application of the Notice placed an automatic liability on those who had not followed the letter of the regulations. They submitted that as there was no evidence of fraud in the movement of goods and that, as the guarantee also turned out to be valid, it was disproportionate to assess them to the excise duty.

76. We agree with and are bound by the decision in *Butler* (which also considered *Polihim* and *Vakarų*) which concluded (at §148) that, as the Directive imposes strict liability, the question of whether or not there was any fraud involved in the movement is not relevant.

Other submissions

No duty point

77. The appellant also argued that it was not appropriate to raise a duty point as there had been no consumption of the goods in connection with the release from the warehouse. There was a risk of a double duty charge in such circumstances, as a further duty point could arise when the goods were released for consumption.

78. HMRC contended that the Upper Tribunal had concluded in *Butlers Ship Stores Limited* [2018] UKUT 0058 ("*Butler*") that prescribed regulations must be complied with for a duty suspension arrangement to exist. *Butler* had confirmed that "released for consumption" includes the position where the goods have left a duty suspension arrangement as, where the duty suspension requirements have not been complied with, a duty suspension arrangement cannot exist.

Discussion

79. There was some discussion as to the impact of the drawback provisions with regard to a double duty charge. As the appellant agreed that they could pursue drawback if a duty point arose in this case, those arguments are not considered further.

80. As set out above, in circumstances where the warehousekeeper does not know that there is a valid guarantee in place and so does not know that the requirements of the EU Directive are met, the movement of such goods will be an irregular departure from duty suspension.

81. The Directive (and UK legislation) both provide that, where goods depart from a duty suspension arrangement, including an irregular departure from the warehouse, an excise duty point arises (Article 7(2)(a)) and the warehousekeeper is liable to the excise duty that has become payable (Article 8(1)(a)(i)).

82. The appellant themselves accepted that it could be reasonable that a duty point arose if they had made no effort to ensure that a guarantee was in place or had accepted a fraudulent fax. We consider that it is equally reasonable that a duty point arises in circumstances such as this where the appellant was supplied with a movement guarantee that belongs to a company that is not the transporter which it has been advised is involved and takes no steps to check before releasing the goods whether the company that provided the guarantee is a transporter (or other relevant person permitted by national law to provide a guarantee) in respect of the consignment.

83. We find that, in line with the decision in *Butler*, the goods were deemed to have been released for consumption for the purposes of excise duty when they were released by the appellant without having established that a valid guarantee was in place. As the goods were deemed to have been released for consumption, a duty point arose. Both EU and national law provides that the excise duty can be assessed on the warehousekeeper in such circumstances.

HMRC discretion

84. The appellant argued that s12(1A) Finance Act 1994 states only that HMRC "may" assess the duty and, although they accept that HMRC are required to collect duty and have limited scope not to do so, nevertheless HMRC are required to construe Excise Notice 197 in accordance with the principle of proportionality and following the decision in *Technip Coflexip Offshore Ltd [2005] UKVAT V19298 ("Technip*") should take into account the fact that the appellants had complied with the vast majority of the requirements; all that was missing was written confirmation from ACP as to the guarantee before the movement of goods. In such circumstances, it was not proportionate to charge the appellant.

85. HMRC submitted that the decision in *Butler* makes it clear (§148) that the word "may" does not give a general discretion. The general obligation on HMRC to collect duty that is due precludes the interpretation of "may" in the legislation as providing a discretion as to whether to make an assessment.

Discussion

86. We find that following the decision in *Butler*, which is binding upon us, the word "may" in s12(1A) does not provide discretion to HMRC as to whether or not to raise an assessment.

Decision

87. For the reasons set out above, we find that the appellant did not comply with the requirement to establish that a valid guarantee was in place to cover the relevant movements of goods before the goods were moved; that the provisions of Excise Notice 197 are not disproportionate; that a duty point arose as there was an irregular departure of the goods from duty suspension; that HMRC does not have a general discretion as to whether or not to raise an assessment.

88. The appeal is therefore dismissed.

89. 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 12 NOVEMBER 2020