



[2021] UKFTT 0204 (TC)

**TC08154**

*Keywords: Excise Duty, appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/07469**

BETWEEN

Paul Murphy

Appellant

-and-

THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE Heather Gething  
MEMBER Julian Sims**

**The hearing took place on 10 and 11 March 2021. With the consent of the parties, the form of the hearing was V (video) all parties attended remotely using the Tribunal video platform. A face-to-face hearing was not held because of the restrictions imposed by the Covid 19 pandemic. The documents to which the Tribunal was referred were contained in a bundle of 91 pages and an authorities bundle of 189 pages and we received skeleton arguments for both parties.**

**The hearing was open to the public.**

**Mr Joseph O'Keefe, counsel, instructed by Tiernans, solicitors, for Mr Murphy**

**Miss Ameila Walker, counsel instructed by HM Solicitors' Office of HMRC for the Respondents.**

## DECISION

### INTRODUCTION

1. This is an appeal against an assessment to excise duty in respect of 540,000 cigarettes (“**the goods**”) seized by HMRC from a Transit van in a dawn raid on 7 January 2016 at the premises of Just Concrete Fencing Limited (“**Just Concrete**”) in Mansfield Woodhouse. There are three issues:

(1) Whether the assessment satisfies the requirements of regulations 5 and 6 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (**HMDP**), in particular

- (a) Whether the Appellant “held” the goods at the excise duty point,
- (b) Whether there had been an earlier excise duty point which ought to have been assessed, and
- (c) Whether an assessment on the Appellant alone was proportionate or fair given that, under Regulation 10, there was an earlier duty point and there were others who would be jointly and severally for the duty.

2. The Skeleton Argument of the Appellant filed and served on 23 February was more expansive than the short statement in the notice of appeal, expanding on the issue whether the Appellant held the goods and challenging the assessment on grounds of lack of proportionality. The Respondents challenged the admissibility of these so-called expanded grounds on the ground that they were filed late. As the issue of whether the Appellant held the goods was articulated in the notice of appeal and as the Regulations at the heart of this appeal were introduced to implement European directives, so that principles of EU law are in play, I dismissed the Respondent’s application.

3. Evidence

3.1 The Tribunal heard oral evidence from:

Mr Paul Murphy (“Mr Murphy”)

Officers Booth, Connolly, Clamp, Hockett, Jones and Warner, all of whom had been at the premises of Just Concrete during the raid during which Mr Murphy was arrested. The only evidence they gave was that in their notebooks. They replied to every question, which was not answered by the content of their statements or their notebooks, “neither confirm nor deny”. The Officers sent on the raid did not know the background intelligence that led to the raid.

Officer Lawrence. Officer Lawrence handled the assessment of duty on the goods. He admitted that he had done nothing to identify an earlier excise duty point other than check on the DVLA site as to the current registered keeper of the Transit van.

3.2 We received some details of the information available to Officer Nelson, the senior officer in charge of the civil investigation to whom Officer Lawrence reported but he had no information as to what led to the investigation and visit to the premises of Just Concrete.

We did not receive any information from the senior officer who controlled the criminal investigation, raid and prosecution. Neither the charge sheet nor any other document relating to the criminal trial was available to the Tribunal.

### THE FACTS

4. We find the following material facts:

(1) In 2015 Mr Murphy who is from Northern Ireland, had lost his father and in early 2016, was suffering from depressive illness and alcohol addiction. He was not in employment and his finances were in poor order. He had been in a pub with a close friend of his late father in Northern Ireland when a stranger began talking to him and recognising his need for finance asked him to deliver a van loaded with goods from Birmingham to Mansfield Woodhouse in England. Having ascertained the goods in the van were not drugs he agreed to assist. Mr Murphy would be paid £500 for completing the job and was given £200 to cover his travel to the UK and accommodation expenses in Birmingham. Mr Murphy did not bring the goods into the United Kingdom.

(2) On the 6 January 2016, Mr Murphy travelled from Northern Ireland to Birmingham. He took a train to Dublin, a ferry from Dublin to Holyhead and then travelled by train from Holyhead to Birmingham. He stayed at a hotel on the outskirts of Birmingham overnight on 6 January. The Transit van was waiting for him at the hotel. He was told to be at the destination by 8.30. He travelled to Mansfield Woodhouse in the morning of 7th January arriving at his destination between 8 and 8.15 am. He understood that the van which was loaded with counterfeit goods was to be delivered to the premises of Just Concrete Fencing (“Just Concrete”) in Park Street, Mansfield Woodhouse.

(3) Upon arrival at the premises of Just Concrete Mr Murphy parked the van in the yard and was greeted by Mr Holmes. Mr Murphy had never met Mr Holmes before. At first Mr Holmes seemed not to know the purpose of Mr Murphy’s visit. Mr Murphy informed him that he had goods to be delivered and opened the rear doors of the van revealing two large cardboard boxes. That was the first time Mr Murphy had seen the contents of the van. Mr Holmes told Mr Murphy that he would need a forklift truck to empty the van so they would have to wait until 9am to do that and invited Mr Murphy to have a coffee while they waited. Mr Murphy closed the doors of the van, gave Mr Holmes the keys to the van and walked with Mr Holmes to the office. The next thing Mr Murphy knew was the officers of HMRC were raiding the premises.

(4) HMRC Officers Booth, Connolly, Hocket, Jones, Parker and Warner were in the vicinity of the premises of Just Concrete between 8.15 and 8.22 on 7 January 2016. They entered the yard at approximately 8.22. Without the van being opened or the CCTV installed on the premises being viewed, at 8.38 the Appellant was arrested and cautioned by Officer Hocket for fraudulent evasion of excise duty contrary to section 170(2) Customs & Excise Management Act 1979. Officer Hocket was acting on the instruction of Officer Booth although Officer Stuart Martin who was not at the premises was in overall charge of the operation. The notebooks of the officers indicate that the operation was named Operation LISP. We infer from these facts that HMRC were acting on information about the delivery of non-UK duty paid excise goods to the premises of Just Concrete.

(5) The Appellant appeared before Manchester Crown Court on 24 May 2017, where he pleaded guilty of attempt to fraudulently evade duty contrary to Section 170(2)(a) of the Customs & Excise Management Act 1979. He did a deal, he had agreed to plead guilty on the basis that there would be a fine of about £500 and suspended sentence but it would all be done and dusted as he had acted as a courier only. He was given a sentence of 6 months suspended for two years. No confiscation order was made against him. Mr Murphy has no money or assets. He has been unemployed during the Covid crisis, but he has had a benefit reassessment and hopes to return to work.

(6) The CCTV footage shows Officers Clamp asking Mr Wayne Holmes as saying he opened the back of the van because he thought Mr Murphy wanted panels. The officers found that Mr Murphy did not have the keys to the van when he was arrested. There was a red mobile phone in the waste basket of the office which Mr Holmes said must belong to Mr Murphy as he had never seen it before.

(7) Mr Murphy did not provide information to the officers during the raid as he was under caution immediately he was arrested, later he failed to answer upon advice from his solicitor. HMRC did not approach Mr Murphy after the criminal proceedings in Manchester about the delivery.

(8) The mobile phone data showed there had been no contact between Mr Murphy and Mr Holmes.

(9) HMRC Officer Lawrence was the case officer dealing with the civil aspects of the seizure of the goods. He had been handed information from the team handling the criminal investigation and dawn raid. The information included the charge sheet and was not made available to the Tribunal. He made an enquiry of the DVLA to ascertain a current registered keeper of the vehicle. But as none had been registered, he considered the van to be “*in trade*”. He made no enquiry of Mr Holmes, or the owners or directors of Just Concrete or the former registered owner and registered keeper of the transit van. By letter dated 20 December 2016, HMRC Officer Lawrence issued an assessment in respect of excise duty in the sum of £130,302,00. The letter stated that:

*“Where goods are held outside of a duty suspension arrangement and UK excise duty has not been paid, relieved, remitted or deferred under a duty deferment arrangement, a duty point is created under regulations 5 and 6(1)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (HMDP). As you were holding the goods, you are liable to pay the excise duty under regulations 10(1) of the HMDP Regulations.”*

*“I am therefore, assessing you for the excise duty. Please find enclosed:*

- *Form EX601 (Excise Duty Assessment), assessing you for £130,303.20 of excise duty under section 12(1A) of the Finance Act 1994.*
- *A schedule which shows how the excise duty has been calculated.”*

(10) Officer Lawrence did not know whether the goods were released from a duty suspension arrangement to which Regulation 6(1)(b) applied, or whether the goods had been imported from outside the EU in which case Regulation 13 applies.

(11) A review of Officer Lawrence’s decision was requested by solicitors for Mr Murphy by letter dated 23 January 2017 but no reply was ever received from Officer Lawrence and no review was conducted. It appears that a letter was sent by HMRC to Mr Murphy asking him to confirm his authorisation for the solicitors to act on his behalf but no response was received by HMRC.

#### **THE UK AND EU LEGISLATION**

5. The enabling power to establish the HDMP Regulations is section 1 of the Finance (No. 2) Act 1992 and that Act and those Regulations implement the provisions of Council Directive 92/12/EEC and Council Directive 2008/118/EC and in consequence in 2016 had to be read in a manner compatible with the Directives and the principles of EU law.

6. Articles 1,2, 7, 8 ,9 and 33 are relevant.

7. Article 1 states the 2008 Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of excise goods.

8. Article 2 states that excise goods are subject to excise duty at the time they are produced or extracted within the territory of the Community or when imported into the Community.

9. Article 7 identifies the time and place of chargeability of the duty and defines the occasions when goods are released for consumption. Article 7(2)(b) is most relevant and provides:

*“the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation”*

Article 8 identifies the persons who “shall be liable”. It is mandatory that those identified are liable. Article 8 (1) (a) deals with duty suspension arrangements.

*“in the case of an irregularity during a movement of excise goods under a duty suspension arrangement .... The authorised warehouse keeper, the registered consignee, or any other person who guaranteed payment in accordance with Article 18 (1) and (2) and any person who participated ....*

Article 8(1)(b) identifies the persons holding the goods

*“in relation to the holding of excise goods as referred to in Article 7(2)(b) the person holding the excise goods and any other person involved in the holding of the excise goods.*

Article 8(1)(d) deals with importation

*“in relation to the importation of excise goods as referred to in Article 7(2)(d) the person who declares the excise goods or on whose behalf they are declared on importation and, in the case of irregular importation, any other person involved in the importation.”*

Article 8(2) deals with the case where more than one person is involved in the importation. It states:

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

Article 9 deals with the rate and conditions for payment and the relevant rates and conditions are those in the member State where the release for consumption takes place.

Article 33 deals with where goods are first released for consumption in one member state and are taken to another state for commercial purposes, and it has not been suggested that this was not the case here. They are to be subject to excise duty in the second member state. The rates and conditions are those applying in the second state. Article 33(3) provides:

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

10. The Finance (No 2) Act 1992 contains the authority to make regulations to implement the 2008 Directive. Those regulations are the HMDP Regulations and they provide as follows:

## **“Part 2**

### **EXCISE DUTY POINTS AND PAYMENT OF DUTY**

#### ***Goods released for consumption in the United Kingdom- excise duty point***

*“5. Subject to regulations 7(2) and (7A), there is an excise duty point at a 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 [...] 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 despatched to one of the destinations referred to in regulations 37(a); and*

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

*(b) they are consumed;*

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

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

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

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

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

*(i) they are despatched to one of the destinations referred to in regulation 37(a), and*

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

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

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

*(j) they were found to be deficient or missing from a tax warehouse.”*

***Goods released for consumption in the United Kingdom - persons liable to pay***

*“10. (1) The following persons are liable to pay the excise duty when the conditions in Regulation 6(1)(b) are met:*

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

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

**Goods already released for consumption in another member state – excise duty point and persons liable to pay**

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

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

- (a) making delivery of the goods;
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.”

**“Irregularity occurring or detected in the United Kingdom**

80. (1)

(2) Where an irregularity occurs in the United Kingdom, the excise goods are released for consumption in the United Kingdom at the time of the irregularity or, where it is not possible to establish when the irregularity occurred, the time **when the irregularity is detected or first comes to the attention** of the [HMRC].” [Our emphasis added]

**Mr Murphy’s position**

**Earliest Excise Duty Point**

11. An assessment in respect of excise duty on goods held outside a duty suspension arrangement by virtue of an irregularity may be made on a person holding goods in circumstances where the duty has not been paid, i.e. where Regulation 6(1)(b) applies; unless an earlier excise duty point can be established on the facts such that a person can be assessed under Regulation 80. Regulation 6(1)(b) only applies if it is not possible to identify the earlier excise duty point. See *Davison & Robinson v HMRC* [2018] UKUT 437 at [66] and [67].

12. This was confirmed in the case of *B&M Retail Limited v HMRC* [2016] UKUT 429 (TCC)(“**B&M**”) [145]. The UT found that the policy of the legislation is to impose liability by reference to the earliest excise duty point see B&M at [150]. Where HMRC are unable to assess a person in respect of an earlier excise duty point, they must assess the person holding the goods see B&M at [155]. But HMRC would be required to reimburse B&M in accordance with their policy should it later be established through evidence that an assessment could have been made in respect of an excise duty point which arose before B&M acquired the goods. See B&M at [157].

13. This issue was also considered in the UT decision in *Davison & Robinson v HMRC* [2018] UKUT 0437 (“**Davison**”) where the UT noted that the decision in B&M was based on three assumptions, (1) that policy behind the directive was that duty must be collected where goods have been released for consumption within the EU, (2) that Reg 7(2) is intended to apply only where “**it has not been possible to establish an excise duty point at an earlier point in time**”, and (3) it is difficult to see how Regulation 6(1)(b) can apply if it could not do so in the circumstance where the earliest excise date could not be established. The UT referred at [69] to the necessity for a member State concerned to determine how the duty is to be levied and from who it is to be claimed. And at [70] the Upper tribunal in *Davison* observed that it was

right for the UT to say that the CJEU case of *van de Water* was strong support for the proposition the 1992 and 2008 directives envisage that the person holding the goods will be liable only where it has not been possible to determine an earlier customs duty point. At [80] the UT said, “*It is consistent with our analysis that **the Directive requires an assessment to be made against the first established excise duty point.***” The UT found in *Davison* that where the person holding the goods bought from a wholesaler, HMRC may not assess the person holding the goods but must recover the excise duty from the wholesaler.

14. Mr Murphy therefore considers that the Directive and Regulations require HMRC to identify the earliest established excise duty point as required by Regulation 6 to raise an assessment for excise duty. It is clear from the facts and circumstances surrounding the dawn raid that HMRC had an intelligence source. Their informant would have been able to assist them to identify the earlier excise duty point. Officer Lawrence had not been provided with the information which others within HMRC had, which might have assisted him to find the earliest excise duty point.

15. HMRC arrested Mr Murphy and cautioned him before asking questions, but HMRC had information before the visit to the premises of Just Concrete. That information has not been provided to the Tribunal. Nor was it provided to Mr Lawrence who was unable to identify the earlier excise duty point. Mr Lawrence did not know why the team had arranged the visit to Just Concrete. Someone took the decision not to inform Mr Lawrence. HMRC has a duty to look for the earlier excise duty point where there has been an arrest and conviction. HMRC’s manual confirms that an assessment can only be made where it has not been possible to establish an earlier excise duty point. It is far from clear that an earlier excise duty point could not be identified. Mr Lawrence has a duty to take into account all information in making an assessment. See *Davison* at [80]. All Officer Lawrence had was the limited statement Mr Murphy gave under caution.

16. Mr Murphy considers that it is understandable that there may be no disclosure of the information before the criminal proceedings are concluded, but once Mr Murphy has been convicted and no confiscation order has been made against him based on his limited role in the arrangements, HMRC had a duty to provide information relevant to the excise duty point to Mr Lawrence, the assessing officer whose duty it was to ascertain the earliest excise duty point. HMRC Officer Jones had admitted Mr Lawrence was “blindsided”.

17. When cross examined on the issue of information available to the officers on the day and information from which they had refreshed their memory (apart from the notebooks which were in evidence), each officer replied that they could neither confirm nor deny (NCND) any statement put to them. Mr Murphy infers from that, that when the officers arrived at the premises of Just Concrete on 7 January, they were looking for a white Transit van with a particular registration number and that there was an intelligence source and they had knowledge of the earlier excise duty point.

18. In the event Mr Lawrence had made very limited enquiry of DVLA, had failed to interview Mr Holmes or those who own or direct Just Concrete.

19. Whereas it is apparently not in HMRC’s interest not to prosecute couriers, HMRC should let matters run. The result of such failure is that the real beneficiaries of the arrangement are not before the Tribunal. The fact that a forklift truck was needed to unload the van points in the direction of others being involved not just the courier.

20. The NCND approach of the witnesses to questions in the Tribunal was not indicated before the hearing and appeared to come as a surprise to counsel for HMRC. It ought to have been addressed before the hearing. It has resulted in witnesses withholding evidence and denying Mr Murphy a fair trial which is a fundamental right.

21. Mr Lawrence and Mr Nelson failed to pursue the owner of the vehicle. limiting their enquiry to a simple search of the DVLA site to identify a keeper on 7 January. It is not reasonable to stop there and not reasonable to let the trail go cold. There was no enquiry. This approach led to a blinkered view of the assessment process. Regulation 6(1)(b) ought not to have been applied. The directive gives Member states discretion to establish policies and procedures to assess duty. But B & M at [153] states “*We would be inclined to agree that it would not be in the interests of justice that HMRC should simply be able to sit back and say that the burden is on the taxpayer to provide evidence to displace its liability when the evidence that HMRC have is in fact sufficient to demonstrate, objectively, that an earlier excise duty point could be identified.*” It goes on to state that the issue would have to be determined in judicial review. It is open to the Tribunal in this case to say that the NCND is concealing information able to demonstrate the earlier excise duty point. It is not in the interest of justice for HMRC to sit back use NCND and hope no one notices.

22. The facts of this case are unique. The existing cases on when a courier is not assessed have not included a case where HMRC has relied on NCND.

### **Holder of the Goods**

23. Mr Murphy says that the issue of who “holds” the goods requires a consideration of who has physical possession of them but also who has actual or legal control of them. This was established in *Dawson’s (Wales) Limited v Commissioners of HMRC* [2018] UKUT 0033 at [149] The terms of the sale can be important to determine who has control and may give control to a subsequent holder while the goods are in transit.

24. This issue was considered by the Court of Appeal in the case of *Perfect v HMRC* [2019] EWCA Civ 465 (“*Perfect*”), the Court noted a number of cases concerning confiscation orders. They considered the case of *Taylor v Wood* EWCA Crim 1151 (“*Taylor V Wood*”) where the court said that holding was broad term which includes possession, but that term itself was capable of many meanings depending on the context. Broadly it could be described as control, directly or through another, of an asset, with the intention of asserting such control against others, whether temporarily or permanently. An innocent haulage company would have possession when the goods are in transit and be a bailee but without any interest in the goods. The legal possession would be shared by the bailee and the bailor in that case. Where the bailee has no knowledge of the unpaid duty goods, the focus turns onto the bailor, who was exercising control over the goods. At [31] the court said “***To seek to impose liability to pay duty on either [haulage company] who as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such question, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty.***” [Emphasis added].

[34] ***...both the language and purpose of Article 7(3) of the 1992 Directive strongly support the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. That is all the more compelling when the person in possession of the goods is an innocent agent.***”

25. In *Taylor v Wood* at [69] the court said “*It was the clear view of the members of this Court in those cases that seek to impose liability on entirely innocent agents would not promote the objectives of the Directive or the Regulations. That view was shared by the judges in the Upper Tribunal in the present case when they concluded at [57] of the judgment) that ‘to impose liability on drivers simply because they were in possession of goods at the time the fraud is discovered, without knowledge of what has occurred or is intended, is neither fair nor*

*proportionate’.*” At [70] the court said “*Given the fundamental importance of proportionality in EU law, it is certainly arguable that had there been any intention to impose strict liability in the 2008 directive, it would have been expressly stated.*” This issue was referred to the CJEU but the outcome is not yet known.

26. Mr Murphy also considers that he was a mere courier of the goods (with no interest in them) to a destination at the premises of Just Concrete. HMRC accept that Mr Murphy was only a courier, as can be seen from their Statement of Case at [36]. Once he reached the destination, his role concluded. In this case, another person brought the goods into the UK and another person required them to be delivered to the UK. It is clear he Mr Murphy had no de facto or legal control of the goods. There is another person directing delivery and requesting delivery. The Court of Appeal in the case of *Perfect* considered in the context of a confiscation order that a person without knowledge cannot be the holder. Although Mr Murphy knew the duty was unpaid, he had no knowledge of the amount of duty and HMRC accepted that in the context of the confiscation proceeding against Mr Murphy when they accepted his plea in the Manchester Crown Court and agreed not to seek a confiscation order.

27. Mr Murphy considers that control of the goods passed to the subsequent holder when delivered to the destination. Mr Murphy effectively stepped aside at that point. Mr Holmes was present at the premises, as can be seen from the CCTV footage, when the van doors were opened, he looked in the van and took control of the goods at that moment. He was simply waiting until 9am until a forklift truck could be used to remove the goods. Mr Holmes took control of the goods by indicating how that van was to be unloaded.

There was no reason to look in the van other than to identify the boxes inside. Mr Holmes account of the event is not credible, that he thought Mr Murphy wanted panels and he was checking to see if they would fit.

28. Mr Murphy had handed the keys to the van to Mr Holmes. Officer Hocket confirmed that Mr Murphy did not have the keys when he was arrested, and no one searched Mr Holmes. That he had no keys militates against Mr Murphy being the holder. He cannot be said to control the goods at that point. The persons or persons on the premises were the holder. HMRC knew the goods were to be delivered and they were delivered to a person on the premises. Upon arrival at the premises the role of courier ceased. Had the officers waited they would have seen the goods unloaded. If he ever controlled the goods that ceased when Mr Holmes arranged for the forklift truck to unload the van. In line with *Perfect* a subsequent consignee was in possession and control see Para [33]. HMRC accepted Mr Murphy’s please in the Manchester Crown Court. Whoever controls the premises must control the goods.

29. Officer Lawrence’s statement that Mr Murphy was holding the goods at the appropriate time within the meaning of the legislation was therefore wrong in fact and law. The goods were being held at the premises of Just Concrete, which was under the control of Mr Holmes at the time.

### **Proportionality**

30. It is neither fair nor proportionate to assess Mr Murphy as being the holder at the excise duty point. Although the decision in *Perfect* is based upon an entirely innocent agent which Mr Murphy is not, comments at [69] and [70] indicate that the Directive does not impose strict liability and the assessment of duty must be proportionate. Specifically, Mr Murphy was a mere courier with no interest in the goods. He knew they were counterfeit goods but had no knowledge of their value or the duty due. Penalties imposed by Criminal courts must be proportionate. The outcome of the criminal proceedings was proportionate. There was no confiscation order made. There was a conviction and a six-month sentence suspended for two years.

31. Mr Murphy is of very limited means and there is a bankruptcy petition outstanding the hearing has been adjourned ending these proceedings. To assess Mr Murphy with £130,000 is not proportionate in this case.

32. In *Perfect* the Court of Appeal noted that the issue of proportionality was central to the operation of the Directive and it was arguable that had it been intended to make the imposition of duty a strict liability offence then the Directive would have expressly said so. Although the Court was considering the issue of an innocent agent the same principles should apply to a mere courier with no economic interest and no control over the goods in the goods and whose involvement in them ended when the goods were delivered to the premises of just Concrete.

33. In considering the fairness and proportionality the Tribunal should take into account the NCND approach of the Officers in failing to assist the Tribunal, and the unfairness that produced, HMRC knew what was happening at the premises. They had information. They have used the NCND approach to stymie the Tribunal proceedings. The Tribunal should also consider Mr Murphy's background of mental ill-health and alcohol addiction, how he got into the arrangements on the day, that he faced up to it, and was prosecuted. HMRC had not asked for a confiscation order, if Mr Murphy had benefited the Court would have made an order. It would not have been proportionate in the criminal proceedings to impose a confiscation order and make him bankrupt and not would it be proportionate in these proceedings.

34. The assessment was invalid as it failed to assess those who had control of the goods at the earliest excise duty point. and/or failed to assess those in actual control.

35. The assessment should be set aside.

### **HMRC's Position.**

#### **Excise Duty Point**

36. HMRC's position is that there is an excise duty point where goods are held outside of a duty suspension arrangement and excise duty has not been paid in respect of the goods per Regulation 6(1)(b) HMDP Regulations. The person liable is the person who holds the goods at the excise duty point and any person who is involved in the holding of the goods, and the liability is joint and several. (See HMDP Regulation 10(1) and (2))

37. The fact that there may be a possible earlier excise duty point does not negate the ability of HMRC to raise an assessment See *Davison* at [67]. "*Clearly HMRC cannot make an assessment until it has the necessary information on which to establish when, how, where and by whose acts the excise duty point occurred. Therefore, in the absence of any relevant information in relation to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, since that is the only excise duty point which HMRC is able to establish.*"

38. The earliest excise duty point which HMRC were able to establish was when HMRC identified the goods in the back of a van that had been driven by Mr Murphy. Mr Murphy had provided no assistance to enable HMRC to identify an earlier excise duty point. The burden of showing there is an earlier excise duty point lies on Mr Murphy. Although Mr Murphy says he did not have the keys Mr Murphy pleaded guilty to attempted fraudulent evasion of excise duty. He therefore did not deny he had physical possession of the goods. See *Dawsons (Wales) Limited v HMRC* [2019] UKUT 0296 (*Dawsons*) at [149]

39. If Mr Murphy was not in possession at the yard he had been in possession while the goods were in transit as the CCTV showed him driving the van into the yard. There is no requirement that the goods should be static for there to be an earlier excise duty point. (See *Dawsons* at [149]).

40. HMRC's operations in relation to the investigation have no bearing on Mr Murphy's liability to excise duty. HMRC rely on *Dawson's* at [149] which indicates that if a person challenges an assessment to excise duty on the basis that there is an earlier excise duty point it is necessary to establish the time of that alleged excise duty point, who had physical possession at the alleged earlier excise duty point and who is the person with the alleged de facto and legal control of the goods and how the person is said to have control and the basis on which it was said to be exercised. Mr Murphy has not provided any such information about any person.

41. Officer Lawrence made his assessment as to the excise duty point in the absence of any other evidence of any earlier excise duty point. The mere fact that there was some intelligence that led to the raid does not mean that HMRC had information of an earlier excise duty point. All the cases look at what evidence the investigation produced and not what led to the investigation. Had there been evidence, Mr Nelson would have expected it to have been provided to him and he in turn would have given it to Mr Lawrence. Mr Murphy was being deliberately vague in his replies. He had failed to provide information to enable HMRC to investigate and prosecute anyone else and therefore to assess anyone else with the duty. If HMRC undertook a limited investigation it was because Mr Murphy had provided no information for them to follow up.

### **Holder of Goods**

42. The starting point in determining the holder of goods is who was in physical possession of them per *Dawson* at [142]. Mr Murphy was in physical possession of the goods in the yard of Just Concrete. The disregard of persons who, while in possession of the goods, have no knowledge of the nature of the goods or of the duty being unpaid, is irrelevant in this case. Mr Murphy knew the duty had not been paid and had pleaded guilty to attempt to fraudulently evade excise duty.

43. There was no evidence that Mr Murphy was supplying the goods to Mr Holmes or Just Concrete so that the goods were under their control or under anyone else's direction and control. In his oral evidence Mr Murphy said Mr Holmes appeared not to be expecting the delivery. It is therefore difficult to say Mr Holmes was in control of the goods. In consequence they were under Mr Murphy's control.

44. If Mr Murphy did not hold the goods at the yard, he held them immediately beforehand while the goods were in transit

45. There is nothing in the authorities to indicate that the owner of the premises has control of the goods. Further Mr Murphy had failed to answer any questions when interviewed under caution to assist HMRC to identify the earlier excise duty point. Other than to say he had had very limited involvement; Mr Murphy gave very scant replies to the Tribunal. He said he could not recall who arranged the hotel for his overnight stay or how he got the key to the van although he thought it was locked when he found it. These inconsistencies explain why HMRC did not pursue enquiries as to the possibility of an earlier excise duty point.

46. In relation to "holding" the goods, there is no question that Mr Murphy knew the goods were cigarettes as he had pleaded guilty to the offence. There is no authority that the holder has to know the quantity and the value of the goods and the duty due. If that were the case the legislation would exclude couriers and they are not excluded. He cannot rely on the case of *Perfect*. The facts are so very different.

### **Fairness and Proportionality**

47. It is fair and proportionate to impose the liability for the duty on Mr Murphy. Mr Murphy may not rely on *Perfect* which involved an innocent agent [45]. *Perfect* does not open the

concept to all cases. The principle is confined to innocent agents. Mr Murphy was guilty of criminal conduct for his part in an attempted fraudulent evasion of excise duty.

48. The policy of HMRC is to pursue excise duty to prevent goods circulating without payment in Member States. It is irrelevant that a person in possession is not the beneficial owner and therefore would be unfair to assess the courier to duty. It would lead to an inability to assess couriers.

### **Discussion**

49. The Regulations under consideration are derived from the European Directive and in consequence must be read in a manner consistent with the provisions of the directive and under principles of EU law must be fair and proportionate in their effect.

50. Whatever the circumstance of the non-payment of excise duty the Directive requires that those holding and those involved in the holding should be jointly and severally liable. Implicit in this is an expectation that the Member State will identify the role played by the parties involved, that would include the party importing the goods from another member State, the person involved in the delivery and the person to whom the goods are delivered.

51. The Directive requires duty to be levied on goods that have been seized. Imposition of the duty in such a circumstance operates as a deterrent and penalty. All penalties must be fair and proportionate.

52. The goods in this case appear to have been cigarettes imported from another territory. The HMDP Regulations introduced to give effect to the Directive indicate at Regulation 5 that there is an excise duty point at the time goods are released for consumption and the occasions on which they are so released are identified in Regulation 6. Regulation 6(1) (b) and (d) are potentially relevant. Regulation 6 (1)(b) deals with the circumstance where excise goods are held outside of a duty suspension arrangement and duty has not been paid and (d) deals with importation from a member state where the goods are not immediately placed into a duty suspension arrangement. The occasion in (d) would have predated the occasion in (b) in the case of goods imported from another member State. HMRC may therefore assess a person who is holding the goods under Regulation 6(1) (b) but only if an earlier excise duty point cannot be identified. This is confirmed by the UT in *B&M Retail* at [45].

53. It is HMRC's duty to make an assessment by reference to all the evidence before them, see *B&M* at [150]. The legislation does not indicate that the evidence which must be considered by the assessing officer is only that which is provided to him. It requires an assessment of all the information available to HMRC, both civil and criminal teams.

54. It is deeply regrettable that:

(1) Officer Lawrence was not in possession of all the information available to HMRC. Officer Hogarth described Officer Lawrence as having been blind-sided, confirming there was more relevant information than Officer Lawrence had received.

(2) The Officer in charge of the criminal investigation did not appear before the Tribunal.

(3) The Officers who attended at the premises of Just Concrete followed a NCND approach to giving evidence,

in consequence the Tribunal was not provided with the assistance it needed.

55. It is also regrettable that Officer Lawrence:

(1) conducted such a cursory investigation before making his assessment confined as it was to a review of the DVLA register and on finding there was no registered keeper of the van, just closed the file.

(2) had no appreciation that the cursory statement made by Mr Murphy was the result of him having been arrested and cautioned before being asked any questions.

(3) did not follow up with Mr Murphy after the conclusion of the criminal proceedings and specifically never undertook a review of Officer Lawrence's position.

56. As to who is the holder - it seems to us that once the goods had been delivered to the yard of Just Concrete and Mr Holmes indicated he needed a forklift truck to unload the goods and would need to wait until 9am, Mr Murphy no longer had control of the goods if he ever had such control. Mr Holmes was directing what was to happen to the goods. That Mr Murphy no longer had control of the goods is supported by the fact that he did not have the keys to the van when he was arrested at 8.38. Officer Lawrence's conclusion that Mr Murphy was the holder, at this point in time, was incorrect.

57. There must have been an earlier excise duty point than when the van was opened but HMRC failed to carry out a proper investigation to establish whether such an appropriate excise duty assessment could be properly raised or ensured that the assessing officer had access to all relevant information to judge whether any investigation was appropriate.

58. Parliament and the Council of Ministers, in our view, intended that the joint and several imposition of duty on those holding and involved in holding goods would produce a fair and proportionate result. An assessment on Mr Murphy alone, in circumstances where HMRC had, or could reasonably have obtained upon enquiry, information which could establish an earlier appropriate excise point, would not be fair or proportionate.

59. We allow the appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

60. 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.

**HEATHER GETHING  
TRIBUNAL JUDGE**

**RELEASE DATE: 02 JUNE 2021**