Neutral Citation: [2023] UKFTT 738 (TC)

Case Number: TC08921

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting in Birmingham

Appeal reference: TC/2020/01571

EXCISE DUTY – assessment – alcohol upon which duty had not been paid found by HMRC in rented unit and seized – Appellant not present at unit during seizure but attended unit later that day – Appellant in possession of key for side-door to unit and knowing location of key for forklift truck obstructing main entrance to unit – Appellant initially denied knowledge but later provided a telephone number for his "boss", an individual who said he owned the goods but who was subsequently uncontactable – whether Appellant holding alcohol at time of seizure – yes – appeal dismissed

PENALTY – unclear on what basis the penalty had been issued – appeal allowed

Heard on: 1 and 2 August 2023
Judgment date: 25 August 2023

Before

TRIBUNAL JUDGE BAILEY
MR DEREK ROBERTSON

Between

GURMIT SINGH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Nigel Gibbons of Nigel Gibbon & Co.

For the Respondents: Miss Charlotte Brown, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal by Mr Gurmit Singh (the "Appellant") is against an assessment to excise duty in the sum of £32,670, and a penalty in the sum of £18,866.

2. The assessment and the penalty arise out of the Respondents seizure of 26,179 litres of alcohol on which duty had not been paid. The Appellant appeals on the basis that he was neither holding the alcohol, nor liable to the penalty, and he argues that his appeal against both assessment and penalty should be allowed.

LATE APPEAL

3. The relevant assessment and penalty were issued on 3 April 2018. A review decision in respect of the assessment was issued on 29 August 2018. It was not until 11 March 2020 that the Appellant received a copy of the review decision (disclosed to him in proceedings he brought to set aside a statutory demand) and he then appealed to the Tribunal on 9 April 2020. The Respondents did not oppose the appeal being admitted late.

4. We took the opportunity to discuss this issue prior to the beginning of the hearing. Applying the principles set out in *Martland v HMRC* [2018] UKUT 0178 (TCC) and giving particular weight to the lack of any opposition by the Respondents and the degree of prejudice to the Appellant if we did not admit the late appeal, we began the hearing before us by giving permission for the Appellant's appeal to the Tribunal to be admitted out of time.

EVIDENCE BEFORE US

5. We had a bundle of documents before us. We also heard oral evidence from Officer Mistry and Officer Musli for the Respondents, and we heard oral evidence from the Appellant.

6. The relevant events had occurred nearly six years before the date of the hearing. Neither Officer Musli nor Officer Mistry was any longer in the role they had been when those events had taken place and it was clear that (unsurprisingly) neither HMRC officer had much recollection beyond their notes of what had occurred. In addition, Officer Musli's evidence was confusing on one point, and not entirely in accordance with the case being led by the Respondents. Nevertheless, we were satisfied that both HMRC officers were doing their best to assist us and that they were telling us the truth. We accept their evidence in full.

7. We appreciate that the events that occurred in late 2017, and the subsequent interaction with the Respondents must have been stressful for the Appellant and that stress would have been exacerbated by the Appellant's limited understanding of written English and (to a lesser extent) his poor understanding of spoken English. However, there were a large number of discrepancies between the various written explanations the Appellant had provided to the Respondents at different times, and also between those written explanations and the Appellant's oral evidence to us (given with the assistance of an interpreter). We do not accept that language difficulties would explain all of these discrepancies, not least because the Appellant had had some help with his written responses, including (as he told us) from two firms of solicitors. We find that on some occasions before us the Appellant either sought to evade the question (such as when he did not accept that his initial response to the Respondents, which he no longer stood by, was untruthful) or he gave us an answer that he thought would assist his case, or lessen his involvement in events (for example, when he emphasised that he loaded vehicles but he had never unloaded vehicles or transported the alcohol in question). There were also occasions when the Appellant seemed wholly confused by the questions that were put to him. Finally, there were occasions when the Appellant told us that he could not remember events. While we would not expect anyone to have perfect recall of events from almost six years earlier, on some occasions the Appellant was unable to recall much more

recent events (such as who had helped him to write his witness statement signed only nine months before the hearing). For the first of these reasons, we do not accept that the Appellant was a credible witness; for the second and third of these reasons we do not accept that the Appellant was a reliable witness. Therefore, while we accept some of the Appellant's evidence, we do not accept the majority of the Appellant's evidence.

FACTS FOUND

8. On the basis of the documents in the bundle before us and the oral evidence we found as follows:

Background

9. The Appellant has been living in the UK since 2005, when he was in his mid-twenties. The Appellant's first language is Punjabi. He has some spoken English but has difficulties with written English. Throughout the period with which this appeal is concerned, the Appellant ran an off-licence with his wife.

The Appellant's first contact with Bhai-Ji

10. The Appellant told us that on an unknown date in or about June 2017, at a motorway service station, he had overheard a conversation in Punjabi between two other men. The Appellant told us he spoke to one of the men, and a conversation ensued. The Appellant told us that in that conversation he had addressed the other man as Bhai-Ji, a respectful term for an older man. In the ensuing conversation, the Appellant told us that Bhai-Ji had revealed that he operated an alcohol wholesale facility, or cash and carry, and the Appellant had revealed that he had held a forklift truck driver licence. In his witness statement the Appellant said that, in that conversation, Bhai-Ji asked if the Appellant would be interested in some casual work, as a forklift truck operator, and he had accepted that offer of work.

11. We find that a conversation took place between the Appellant and Bhai-Ji in or about June 2017, that during this conversation Bhai-Ji offered casual work to the Appellant, and this offer was accepted.

12. The Appellant told us that at this point he did not ask Bhai-Ji for his name, or his address, or the name or address of the organisation that would engage him. The only knowledge the Appellant had about Bhai-Ji at this time was that he spoke Punjabi. The only contact information the Appellant had for Bhai-Ji was a mobile telephone number.

13. The Appellant did not offer any credible explanation for why he agreed to undertake casual work for a man he had only just met and whose name and address he did not know, especially given that he was already employed in running an off-licence with his wife.

14. It was not suggested before us that Bhai-Ji ever offered to sell alcohol on a wholesale basis to the Appellant, as might have been expected of a genuine alcohol wholesaler who was discussing business matters with a man who ran an off-licence and so might have been expected to be interested in the wholesale purchase of alcohol.

The unit at Thorney Field Farm and when the Appellant began work for Bhai-Ji

15. In his witness statement the Appellant stated that two months after the conversation in the service station, Bhai-Ji telephoned him to provide the location of the premises where he was asked to work. These premises were a unit on a farm known as Thorney Field Farm. The unit was rented from Mr and Mrs Fletcher, who owned the farm. (Below we set out our findings as to the identity of the person who rented the unit from Mr and Mrs Fletcher.)

16. The Appellant did not offer any explanation for why two months should pass between his initial meeting with Bhai-Ji, and Bhai-Ji getting in touch with him. If Bhai-Ji was sufficiently keen to have casual labour that he would offer work to a stranger he had just met

at a service station then it seems unlikely that Bhai-Ji would wait a further two months to contact the Appellant. Given the Appellant's desire to minimise his involvement we find, on the balance of probabilities, that the latest date the Appellant began to work at the unit was the middle of August 2017. We consider it possible that the Appellant began to work for Bhai-Ji at the unit at an earlier date but we make no finding in this respect.

17. The Appellant accepted, and we find, that there were no signs or branding at the unit, or anything else that would identify the unit as a legitimate alcohol wholesaler or cash and carry. When the Appellant was asked in cross examination if the unit was the kind of place where he would go to buy alcohol for his off-licence, he told us that he would not, and that the unit did not appear to be a cash and carry.

18. When the Appellant was asked in cross-examination whether he found it suspicious that there was no branding or signs at the unit, the Appellant told us that he believed the unit was a storage facility and that the wholesalers or cash and carry was located elsewhere. Given the Appellant's experience of buying wholesale alcohol for his off-licence, we do not accept the Appellant was telling us the truth when he said that he believed the unit was part of a legitimate alcohol wholesale business, and that there was nothing about the unit that made him suspicious.

The frequency of the Appellant's visits to the unit

19. The Appellant gave conflicting accounts of the frequency of his visits to the unit prior to 24 October 2017. When first questioned by the Respondents on 24 October 2017, the Appellant stated that he had never been to the unit before, and that his attendance on 24 October 2023 was his first visit to the unit. After he had spoken with Mrs Fletcher, the Appellant told the Respondents that he had been working at the unit for about a month but he did not say how many times he had been to the unit. In his letter to the Respondents of 10 February 2018, the Appellant stated that he had been working at the unit for "over a month".

20. In his letter to the Respondents of 15 April 2018, the Appellant stated he "did visit the premises couple of time" when work was offered to him. In his letter to the Respondents of 24 June 2018, the Appellant stated that he visited the unit "a couple of times whenever I was being hired to do the job".

21. In his Amended Grounds of Appeal, the Appellant contended that he worked at the unit twice a week for about two months. In his witness statement, the Appellant stated that he worked at the unit "2 or 3 times a week". In his oral evidence to us the Appellant said that he worked at the unit two or three times a week, and that his last visit to the unit prior to Tuesday 24 October 2017, would have been the prior Friday or Saturday but he could not recall which.

22. Mrs Fletcher also told the HMRC officers how often the Appellant arrived at the unit. Officer Musli's notebook records Mrs Fletcher's statement that the Appellant was "frequently arriving" at the unit. Officer Mistry's notebook records Mrs Fletcher as telling him that the Appellant visited the unit on a "daily basis". Officer Mistry was asked in cross-examination how certain he was that this had been Mrs Fletcher's comment. Officer Mistry told us that he was "pretty sure" that this was what had been said and that it was obvious to him that Mrs Fletcher had been keeping track of the people arriving at the unit.

23. It is clear from the differing accounts provided by the Appellant that, from his first contact with the Respondents, he has sought to downplay his time at the unit. We consider that the answers given by the Appellant in this regard are self-serving and we do not consider that we can rely upon any of them.

24. We have concluded that the most reliable account of the Appellant's presence at the unit is that given by Mrs Fletcher to the Respondents. Officer Musli recorded that as frequent, Officer Mistry recorded that as being daily attendance and said he was pretty sure this is what

he had been told. We find, on the balance of probabilities, that from the time he first began to work for Bhai-Ji until 24 October 2017, the Appellant attended the unit sufficiently frequently that he was there either every day or almost every day.

The Appellant's access to the unit

25. The unit had a side-door, which could be locked, and shutters at the front. The shutters could only be opened from inside the unit, and they were opened by the operation of bolts. There was no key for the shutters. The shutters could not be opened from the outside. When the shutters were closed and the side-door locked then the key to the side-door would be required by anyone seeking to access the unit.

26. In his letter of 15 April 2018, and in his witness statement, the Appellant stated that the key to the side door of the unit was handed to him by Bhai-Ji when he attended the unit – this was said to take place either at the Appellant's home address, or the Appellant met Bhai-Ji at a location close to the unit. In his letter of 24 June 2018, the Appellant said:

> the keys for the [unit] were dropped at my home on the day of the job.

27. In his witness statement the Appellant said of the side-door key:

> I had collected [the key] from Mr Bha Ji a short time before my arrival.

28. However, in his oral evidence to us the Appellant said that, on 24 October 2017, a different man had met him at the road to the unit, and it was this different man who handed him the key to the side door. The Appellant told us that he had once seen this man driving the forklift truck at the unit, on the first day that he attended the unit, and the next time he saw this man was on 24 October 2017 when this man handed over the key. No name was provided for this man.

29. We have considered this very carefully. In his witness statement the Appellant said that he believed another person sometimes attended the unit drove the forklift truck, and the Appellant stated that he believed this because sometimes the forklift truck would be in a different place at the unit from where he had last left it. The first occasion on which the Appellant said that he had actually seen another person driving the forklift truck at the unit was during cross-examination, and this was when he also mentioned for the first time that a person other than Bhai-Ji had handed him the side-door key for the unit on 24 October 2017.

30. The Appellant did not have a credible explanation for why he made no mention of this other man until he was giving his oral evidence. Given the coincidence of the other man handing over the key for the first time on the very day that the Respondents arrived at the unit, we would have expected this detail to have been mentioned by the Appellant in his witness statement, if not before. The Appellant told us that he did not know who he was supposed to tell about the other man; however, he was questioned by the Respondents on the day of the seizure, had the assistance of a friend and of his brother-in-law, instructed two firms of solicitors and is currently professionally represented. We do not accept that the Appellant had no opportunity until he was giving his oral evidence to mention this other man.

31. If there was another man, who could drive the forklift truck and who Bhai-Ji entrusted with the side-door key (so as to hand it to the Appellant) then there was no reason why Bhai-Ji would need the services of the Appellant. There was also no reason for Bhai-Ji to ask the Appellant to go to the unit on 24 October 2017 when the other man must have been available because (according to the Appellant) the other man was at the end of the road to the unit, ready to hand over the side-door key.

32. We find, on the balance of probabilities, that this other man did not exist and that he was invented by the Appellant during the course of his oral evidence in the hope of strengthening

his case. We find that the Appellant did not see any other person driving the forklift truck at the unit at any time.

33. We have also considered very carefully the arrangements with the key to the side-door of the unit. We have found that the Appellant attended the unit either every day or almost every day. In his witness statement the Appellant said that he could not recall ever seeing Bhai-Ji at the unit or on the site, and so Bhai-Ji must have trusted the Appellant to be alone at the unit. On the basis that the Appellant was trusted to be alone with the key when he was at the unit or on his way to the unit, we do not accept that, on a daily basis, Bhai-Ji would drop off a key with the Appellant and then subsequently meet the Appellant again, the same day, to collect the key. Such caution with regard to the key would serve no purpose given the ease with which the Appellant could have had a duplicate key cut, and given that Mr Fletcher already held a duplicate key.

34. We find, on the balance of probabilities, that on the first occasion the Appellant attended the unit, Bhai-Ji met the Appellant to hand over a key for the side-door of the unit. We find, on the balance of probabilities, that by October 2017 the Appellant was in permanent possession of a copy of the key to the unit side-door in order that he was able to attend the unit, at short notice, whenever directed to do so by Bhai-Ji.

The work undertaken by the Appellant at the unit

35. On the day of the seizure, the Appellant told Officer Musli that his work at the unit was to unload alcohol from a lorry into the unit.

36. In his letter of 15 April 2018, the Appellant told the Respondents:

> I came to the premises to do loading, unloading due to the job I was given on that day and this is obvious I would have the knowledge about the stock and the contents.

37. In his letter of 24 June 2018, the Appellant told the Respondents:

> In my previous statements I have clearly identified my level of involvement and the level of my awareness about the goods I was supposed to pick from the premises. I once again confirm you and assure that the reason for my presence at the premises was purely based upon a telephonic job I accepted from the owner and I was unable to determine the nature and criteria of the goods I was required to transport.

38. In his witness statement, the Appellant said:

> On each visit I spent no more than 2 hours on site which included loading 1 or sometimes 2 vehicles and some stock movement if required.

39. In his evidence before us, the Appellant was adamant that he had never unloaded any alcohol into the unit, and that he had never transported any alcohol; his only role was to load alcohol that was already in the unit into vehicles that came to the unit. When the contents of his previous letters were put to the Appellant he said that he did not know if those letters were wrong because he did not know what written in them.

40. We find, on the balance of probabilities, that the previous letters were written on the instructions of the Appellant and they contained a version of events provided by the Appellant to whoever was assisting him at that time.

41. We find, on the balance of probabilities, that the Appellant unloaded alcohol from vehicles and into the unit, that he loaded alcohol from the unit into vehicles, and that he transported pallets of alcohol to other locations (even if only to other locations within the unit).

42. When asked if the alcohol could be moved through the side-door to the unit, the Appellant told us that a case of alcohol could be moved through the side-door but that the alcohol was not moved in that way, and that it was moved on pallets, which would only go through the open shutters. We find that alcohol was only moved in or out of the unit when it was on a pallet, and the pallets were only moved though the main entrance, through use of the forklift, when the shutters were open.

43. We find that the Appellant was aware that what he was loading and unloading was alcohol. In evidence to us, the Appellant said that he wasn't aware that the alcohol did not have duty paid on it and that, at that time, he was not aware that duty had to be paid on alcohol. We do not find it credible that a man running an off-licence would not know that duty has to be paid on alcohol. We find, on the balance of probabilities, that the Appellant was either aware that the alcohol he loaded and unloaded at the unit did not have duty paid upon it, or he had strong suspicions that duty had not been paid.

The rent at the unit

44. Mrs Fletcher told the HMRC officers that the rent for the unit was paid monthly in cash, that it was £480 per month and that, as at the date of the seizure, the rent was one month in arrears.

45. When the Appellant arrived at the unit on 24 October 2017, Mrs Fletcher identified him to Officer Musli as someone who "sometimes" paid the rent for the unit. In his letter of 10 February 2018, the Appellant said:

> The landlady stated that I regularly paid her rent which is not correct as I only paid her once as I was requested to do so by her father-in-law. I did so after consulting with my boss who would reimburse me at a later date.

46. In both his letters of 15 April 2018 and of 24 June 2018, the Appellant said:

> I was being asked by Mr Bha Ji on two occasions to give money to the landlady, which I did and that's all.

47. In his witness statement, the Appellant said;

> On two occasions, when I collected the keys, I was also handed an amount of cash with instructions to pay the cash to the person who I believe was the owner of the [unit].

48. Before us the Appellant said that he had only paid the rent twice, once when asked by Mrs Flether's father in law, and once when asked by Bhai-Ji.

49. We find the account given by Mrs Fletcher, as recorded by Officer Musli, to be more credible than the accounts given by the Appellant. We find that the Appellant paid rent to Mr and Mrs Fletcher as part of the work he undertook for Bhai-ji. We find that the Appellant paid on a monthly basis over the period he worked at the unit.

Bhai-Ji's desire for secrecy

50. The Appellant told us he did not know the real name of the man he called Bhai-Ji and that he did not know Bhai-Ji's residential or business address. In his letter of 24 June 2018, the Appellant told the Respondents that he:

> didn't even have an opportunity to find [Bhai-Ji's] real name.

51. We find that the Appellant had an opportunity to find out the real identity of Bhai-ji before he accepted an offer of work and on every occasion he came into contact with Bhai-Ji.

52. In his witness statement and in his oral evidence, the Appellant said that on one occasion after he had already begun working for Bhai-Ji, he had asked Bhai-Ji for his name. The

Appellant told us that Bhai-Ji had responded angrily and the Appellant had been told abruptly to get on with his work. When the Appellant was asked in cross-examination about whether he found this response suspicious, the Appellant told us that Indian men could be very rude to people working for them.

53. We do not find it credible that the Appellant's suspicions were not aroused by Bhai-Ji's refusal to provide his real name.

54. In his witness statement and before us the Appellant also said that Bhai-Ji had told him that he should never tell anyone the purpose of his visits to the unit. When he asked if he found this suspicious, the Appellant said that he did not think it was suspicious because beer was stored at the unit and anyone might try to steal it. We do not accept that this is what the Appellant genuinely believed. It is not credible that a person who ran an off-licence would believe that secrecy was the only way of preventing alcohol theft, and it is not credible that the owner of a legitimate alcohol wholesale business would tell his workers that they must not reveal the purpose of their visits when they attended that place of business to work.

55. We find, on the balance of probabilities, that the Appellant was aware that Bhai-Ji was not running a legitimate business from the unit, and he was aware that this was the reason for not telling anyone about the purpose of his visits to the unit.

56. We find that the Appellant chose to continue to work for Bhai-ji despite Bhai-Ji's refusal to provide his name, and despite the suspicious circumstances surrounding the unit.

The events of 24 October 2017

57. At about 11:00 on 24 October 2017, three HMRC Officers arrived at the unit on Thorney Field Farm. Their unannounced visit was on the basis of intelligence they had received that alcohol was being sold without the duty having been paid.

58. One of the officers, Officer Musli, provide his identification to Mrs Fletcher and began to interview her. Mrs Fletcher explained that she and her husband had let the unit, initially to a Manjit, and latterly to a Steve. Mr Fletcher arrived at the unit at about 11:35 and he confirmed that the person renting the unit was known to him as Manjit Singh. Mr Fletcher provided Officer Musli with a mobile telephone number for Manjit Singh, and also a telephone number for each of Steve and a person named Jay.

59. Mr Fletcher agreed to Officer Musli's request that he open up the unit, and he provided the key to open the side-door of the unit. Inside the unit, Officer Musli discovered about 36 pallets of alcohol. This was later confirmed to be 26,179 litres of beer. The shutters to the unit were closed. A forklift truck was parked next to the shutters, and this was preventing the bolts which operated the shutters from being moved. Unless the forklift was moved, the shutters could not be opened.

60. Officer Musli telephoned a colleague who confirmed that the unit was not registered to store alcohol. Permission was given to Officer Musli to seize the alcohol inside the unit.

61. Officer Mistry tried to call the three mobile numbers given by Mr Fletcher but they went straight to voicemail. Mr Fletcher provided Officer Musli with another telephone number for Manjit Singh. A person answered when Officer Musli telephoned this number but hung up when Officer Musli explained who he was and that he was at the unit. Officer Musli informed Mr and Mrs Fletcher that he was going to seize the alcohol on the basis that it was liable to duty and he believed duty had not been paid. Officer Musli issued Mr and Mrs Fletcher with Factsheets CC/FS9 and CC/FS12. These relate to wrongdoing penalties and the Human Rights Act 1998.

62. Mrs Fletcher provided Officer Mistry with images on her mobile telephone of two vehicles that came to the unit, a white car and a white van. Mrs Fletcher said that there were daily visits by people to the unit. Officer Mistry telephoned his office to ask for PNC checks to be made on the two number plates that seemed to be shown in the images provided by Mrs Fletcher. No response to this request was received while the HMRC officers were at the unit.

63. In order to move the forklift truck, so that the shutters could be opened, Officer Musli called the number on the side of the forklift truck and spoke to a Mr Hill. Mr Hill informed Officer Musli that he had retired and the firm that had owned the forklift truck no longer existed. Mr Hill thought that the forklift truck might be one of a number of forklift trucks that had been stolen two years previously. Mr Hill said that he would try to find someone who could attend the unit to move the forklift truck for the Respondents.

64. Mr Fletcher left the unit at this point but Mrs Fletcher remained with the HMRC officers. Mrs Fletcher told Officer Musli that she had no written rental agreement for the unit, and she was unable to provide any further identifying information about the person renting the unit.

65. Officer Musli made further telephone calls to arrange for the Respondents to transport the alcohol away from the unit once the shutters had been opened. Mr Hill rang Officer Musli to inform him that he had arranged for a forklift driver to attend the unit and that the driver would be there at about 14:50.

66. At about 13:25, a Mr Ravinder Singh arrived at the unit in a white Sprinter van. Mr R. Singh told Officer Musli that he had never been to the unit before, that he was a delivery driver and that he was at the unit to pick up milk. Mrs Fletcher said that they did not sell milk but she did not make any other comment about Mr R. Singh and did not identify him as a person who she had seen before. Mr R. Singh was unable to give the name or a telephone number for the company he worked for. Officer Musli asked to look inside the white van. When Mr R. Singh opened the van doors, there were about 30 cases of beer. Mr R. Singh said that he had been asked to deliver these cases of beer by some men he knew but for whom he did not have names or telephone numbers. Mr R. Singh produced one invoice to show to Officer Musli but this invoice did not cover all of the alcohol inside the van. Mr R. Singh said that he did not know who owned the alcohol not covered by the invoice but that, the day before, the van had been collected from him, loaded with the alcohol, and then dropped back with him. Mr R. Singh told Officer Musli that he was awaiting delivery instructions.

67. Officer Musli informed Mr R. Singh that he was going to seize the alcohol in the van that was not covered by the invoice as he believed that no duty had been paid on it. At about 14:00, Officer Musli issued seizure notices and factsheets to Mr R. Singh.

68. Meanwhile, at about 13:35, another white Sprinter van arrived at the unit. This van was driven by the Appellant.

69. The Appellant told us that he could not recall whether he was shown any official identification by Officer Musli when he had arrived at the unit, and that at that time he did not understand who the Respondents were and he did not understand that the HMRC officers were present in any official capacity because they were not wearing uniform.

70. We find, on the balance of probabilities, that Officer Musli did show the Appellant his identification. This would have been a standard practice for Officer Musli and there was no reason for him to have failed to show his identification on this particular occasion.

71. The Appellant initially told Officer Musli that he had come to the unit to buy eggs and that he had never been to the unit before. The Appellant also denied knowing Mrs Fletcher. The Appellant now accepts that he was not at the unit to buy eggs, and that he had seen Mrs Fletcher on previous occasions when he was at the unit. However, the Appellant told us that

he had not lied to the Respondents. We understand the Appellant's position on this to be that, at that point he did not know that Officer Musli worked for the Respondents, so he was not lying to the Respondents because, although his answers were untruthful and he accepts they were untruthful, he did not know that Officer Musli had any right to question him.

72. Given the Appellant ran an off-licence, we do not find it credible that the Appellant did not know who the Respondents were. We find that the Appellant gave an untruthful answer to Officer Musli knowing that his answer was untruthful and knowing that he was speaking to a HMRC officer. We find, on the balance of probabilities, that the Appellant lied to Officer Musli in the hope that he would be able to persuade Officer Musli that he did not have any involvement with the alcohol he knew was stored at the unit.

73. Mrs Fletcher told the HMRC officers that she recognised the Appellant as someone who made daily visits to the unit, and that the Appellant sometimes paid the rent for the unit. Mrs Fletcher spoke with the Appellant, telling him that she did not want to be involved in any wrongdoing. Officer Musli issued factsheets CC/FS1d and CC/FS16 to the Appellant.

74. The Appellant told Officer Musli that he did not have a name for his boss, and that he unloaded beer from a truck into the unit. Officer Mistry then asked the Appellant if he could move the forklift truck that was preventing the shutters from being opened. In his letter of 10 February 2018, the Appellant wrote:

> I was asked if I had the forklift key to which I replied yes.

75. In his oral evidence, the Appellant told us that the key to the forklift was on a ledge inside the unit. This is consistent with the evidence of Officer Mistry and we accept that the key to the forklift truck was on a ledge inside the unit, and not on the Appellant.

76. As the HMRC officers and the Fletchers had been inside the unit for about two hours at this point, without finding the key to the forklift truck, we find, on the balance of probabilities, that the location of forklift key was not obvious to the casual observer. The Appellant knew the location of the key to the forklift truck, and he used that key to move the forklift truck away from the shutters. The Appellant then assisted the HMRC officers in opening the shutters to the unit, and he helped himself to a bottle of water in the unit.

77. At about 14:30, other HMRC officers and a driver arrived to load the alcohol.

78. After the Appellant had moved the forklift truck, Officer Musli spoke to him again. The Appellant again stated that he did not know the name of his boss but he volunteered that his boss drove a white Mercedes. Mrs Fletcher stated that Manjit Singh drove a white Mercedes. The Appellant also volunteered that he could call his boss.

79. At about 15:40, the Appellant telephoned the number he had for his boss (a different number to the two numbers provided by Mr Fletcher) and the Appellant then handed his mobile to Officer Musli. Officer Musli spoke for about ten minutes to a person who confirmed he was named Manjit Singh. This man confirmed that he was in charge of the goods and that he could produce the paperwork for the goods in the unit. This man also said that the company trading name was AMS Trading but that he did not know the address as he had recently moved. This man said that he could not speak further with Officer Musli as he was driving in London at that time, but that he would call Officer Musli the next day with more information.

80. As the number provided to Officer Musli by the Appellant was the number for Bhai-Ji, we find, on the balance of probabilities that either Bhai-Ji's real name is Manjit Singh, or that Manjit Singh is a false name used by Bhai-Ji. We find, on the balance of probabilities, that the person who Officer Musli spoke, is the person who rented the unit from Mr and Mrs Fletcher, and he is also the person who engaged the Appellant to load and unload alcohol at the unit.

81. Seizure notices in respect of the alcohol in the unit were left in the unit for anyone coming to the unit at a later date.

82. The Appellant left the unit at about 15:50. The HMRC officers labelled, tallied and removed from the unit the alcohol that they had seized.

Subsequent events

83. Bhai-Ji/Manjit Singh did not telephone Officer Musli the next day and no further calls to that telephone number were answered. Officer Musli was unable to identify the company that was said to own the alcohol seized in the unit. Neither Officer Mistry nor Officer Musli took further steps to identify the owners of the vehicles shown in the images provided by Mrs Fletcher.

84. On 2 November 2017 Officer Musli visited the Appellant's off licence. The Appellant was not able to provide Officer Musli with any further information about Bhai-Ji. On 14 November 2017, Officer Musli sent a Notice of Seizure to the Appellant. This was in respect of the 26,179 litres of beer found at the unit.

85. No challenge was made by any person to the legality of the seizure of the alcohol seized at the unit, and it was duly condemned as forfeit.

86. On 23 January 2018, Officer Musli issued a pre-assessment notification to the Appellant. Officer Musli explained in that notification that he intended to raise an assessment to collect the excise duty payable at the duty point created when the beer in the unit had been released for consumption. Officer Musli. Officer Musli also issued a warning that he intended to issue a penalty. By letter dated 10 February 2018, the Appellant replied to Officer Musli, providing a version of events as set out above.

87. On 22 March 20218, another HMRC officer sent the Appellant a VAT pre-assessment notification. This letter suggested that, on the basis of the length of time that the Appellant had been renting the unit, he should have been registered for VAT. In this letter it was suggested that a VAT assessment of £96,514 would be raised.

88. On 3 April 2018, Officer Musli issued the Appellant with an excise duty assessment in the sum of £32,670, and a penalty in the sum of £18,866. These are the impositions under appeal. In a first letter to the Appellant dated 3 April 2018, Officer Musli set out his understanding of events in a series of bullet points, and he explained that any person involved in the holding of the excise goods was liable to excise duty, and any person involved in holding the goods was jointly liable.

89. At the conclusion of that letter Officer Musli wrote:

> The handling of Excise goods on which there is unpaid excise duty is considered an Excise Wrongdoing under Schedule 41, Finance Act 2018 which may result in a penalty in addition to any duty charged.

90. Officer Musli referred to enclosed factsheets FS9 and FS12, and asked the Appellant to contact him if he required any further explanation.

91. Under cover of a separate letter, also dated 3 April 2018, Officer Musli issued a penalty to the Appellant. The penalty, in the sum of £18,866, is described as an excise penalty issued under Schedule 41 Finance Act 2018. The calculation was said to be shown in an enclosed schedule. In our bundle the only copy of the schedule was placed with the penalty warning letter, issued to the Appellant on 23 January 2018. The heading to the penalty schedule is:

> Failure to notify penalty charged under Schedule 41 Finance Act 2008.

92. Officer Musli was asked about this penalty in cross examination. He was asked if the title was a mistake as the Respondents' Statement of Case did not argue that the Appellant had failed to notify a relevant liability. Officer Musli told us that the title was not a mistake as the Appellant had failed to provide any details of the duty paid status. Under further questioning, Officer Musli told us that he considered the Appellant was liable to a penalty because he was the person who ought previously to have paid the duty on the alcohol. It was put to Officer Musli that the Statement of Case said that the penalty was for handling but that Officer Musli seemed to be saying that, at the time the penalty was issued, it had been issued for failing to notify liability? Officer Musli agreed that was what he was saying. Officer Musli was asked if this was still his view, and he confirmed to us that this was still his view of the Appellant's behaviour.

93. In a letter dated 15 April 2018, the Appellant responded to the bullet points in Officer Musli's assessment letter, with the explanations set out above. The Appellant denied that he was the person who was holding the alcohol at the unit. Officer Musli replied in a letter dated 13 June 2018, explaining that, if the Appellant disagreed with his decision, the Appellant could ask for a review or appeal directly to the Tribunal. At the conclusion of this letter, Officer Musli again repeated that the handling of excise goods on which there was unpaid excise duty was considered to be an excise wrongdoing.

94. By letter dated 27 April 2018, another HMRC officer issued a letter to the Appellant. That letter began:

> I am writing to tell you that you needed to tell us of your liability to be registered for VAT no later than 24 May 2017, and you needed to be registered for the period from 24 May 2017 to 24 October 2017.

95. The letter continued by informing the Appellant that, as he had not filed VAT returns, a VAT assessment in the amount of £48,760 had been issued. In an undated letter the Appellant replied to state he was confident that he was not liable to the VAT as he was a driver who offered his services.

96. On 4 May 2018, the Respondents issued VAT assessments to the Appellant for the VAT periods ending 07/17 and 10/17. These totalled £86,942. In a letter dated 18 May 2018, the Respondents wrote to the Appellant to inform him that these two assessments replaced the assessments issued on 27 April 2018. On 21 May 2018, the Appellant replied, again stating that he was not liable for the VAT.

97. On 29 May 2018, the Respondents issued a penalty in the amount of £50,209 to the Appellant. The letter stated that there was an enclosed schedule explaining about them, but that schedule was not in the bundle before us.

98. On 13 June 2018, Officer Musli wrote to the Appellant, offering him the option to have a review of the decision to charge him with excise duty. By letter dated 24 June 2018, the Appellant sought a review of the assessment. In this letter the Appellant set out a further explanation, as set out above, and stated that he did not consider himself to be the person holding the alcohol.

99. On 29 August 2018, a review officer issued a review decision. The Appellant did not receive that letter until a further copy was provide during the course of bankruptcy proceedings.

100. On 9 April 2020, the Appellant appealed to this Tribunal against the excuse duty assessment and the penalty of £18,866. This appeal was stayed pending the decision of the Court of Justice of the European Union in *HMRC v WR* C-279/19, and then the Court of Appeal in *HMRC v Perfect* [2022] EWCA Civ 330. Thereafter, the Appellant filed revised grounds of appeal that also served as Mr Gibbons' skeleton argument before us.

BURDEN OF PROOF

101. In an appeal against an assessment to excise duty, the onus is on the Appellant to displace the assessment raised by the Respondents. The standard of proof is the balance of probabilities.

102. In an appeal against a penalty, the onus is on the Respondents to demonstrate that the legislative criteria for raising that penalty have been met. The onus then switches to the Appellant to show that he has a reasonable excuse for the behaviour in question or that the penalty should be reduced. Again, the standard is the civil standard of the balance of probabilities.

103. In this case the Appellant did not argue that there was any reasonable excuse, or that the penalty should have been imposed in a lesser amount. The Appellant took an all or nothing approach, accepting that the penalty either had been properly imposed, or it had not.

THE ASSESSMENT TO EXCISE DUTY

104. The Appellant was assessed to excise duty of £32,670 under Section 12 Finance Act 1994 on the basis that he was holding the seized alcohol at the time it was released for consumption.

105. The legislation upon which this assessment is founded is The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "HMDP Regulations"). Regulation 5 of the HMDP Regulations provides that there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom. Regulation 6(1)(b) provides that excise goods are released for consumption in the United Kingdom at the time when the goods 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;

106. Regulation 10 of the HMDP Regulations provides as follows:

> 10.—(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.
>
> (2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

107. The parties agreed before us that the Respondents were required to assess against the earliest point in time at which they were able to establish that the alcohol had been held outside a duty suspension arrangement. Although some of the cross-examination suggested that the Appellant was not happy that Officers Musli and Mistry had not made more effort to find Bhai-Ji/Manjit Singh, the Appellant accepted that the Tribunal has no power to consider whether an earlier duty point could have been identified. The earliest duty point identified in this case was the moment at which the alcohol was seized by the Respondents.

108. The Appellant argued that he was not liable to be assessed to excise duty because he was not holding the alcohol at the time it was seized. In his Amended Grounds of Appeal, as clarified in Mr Gibbons' oral submissions, the Appellant argued that:

- he was not holding the goods as there was no point at which he was in physical possession of the alcohol in question,
- he did not control the alcohol with the intention of asserting control against others, so he did not have de facto control of the alcohol, and
- he was not the only person who had access to the unit, so it was not possible to know whether the alcohol that was seized from the unit was the same alcohol that had been in the unit when the Appellant had last attended prior to the seizure.

109. We have found that the Appellant was not at the unit when the alcohol was seized. We accept that he was not in physical possession of the alcohol at the moment of the seizure.

Does holding require physical possession?

110. The parties referred us to *R v Taylor and Wood* [2013] EWCA Crim 1151 for guidance on the meaning of "holding". In that decision, Mr Justice Kenneth Parker held:

> 29. "Holding" is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, Goode on Commercial Law, Fourth Edition, p 46. In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.
>
> 30. In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods, as explained above. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a "holding" of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier. Wood was correctly shown on Yeardley's invoice to be Yeardley's client and the consignee of the goods that were being transported. Under the Convention, as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants.

111. On the basis of that passage, we are satisfied that physical possession of excise goods is not required for a person to be holding those goods. Although the law has moved on as regards innocent agents, we conclude that remainder of the passage remains good law and that, in deciding whether the Appellant was holding the alcohol, the issue for us to decide is whether the Appellant was the person who was exercising control over the alcohol at the duty point, with the intention of exercising that control as against others.

What is required for a person to be exercising control?

112. We have found that, at the moment when the alcohol was seized, the Appellant was in possession of a key to the unit side-door, that he knew where the key for the forklift truck could be found, and that he was able to move the forklift truck.

113. Mr Gibbons argued that for the Appellant to be exercising control, he must be able to assert control against all others. Mr Gibbons reminded us that the Appellant had acted on the instructions of Bhai-Ji. Mr Gibbons submitted it was not possible for the Appellant to be exercising control against all others because he did not assert control against Bhai-Ji.

114. We asked Mr Gibbons whether he agreed that the Appellant, as agent of Bhai-Ji, was asserting control against the rest of the world when carrying out Bhai-Ji's instructions? Mr Gibbons submitted that was insufficient. In Mr Gibbons' submission, for a person who was an agent to have de facto control of goods then that agent must be able to exert control of those goods against everyone, including their own principal, and that was so even when the agent's only involvement with the goods was when carrying out the instructions of their principal.

115. We do not agree with Mr Gibbons on this point. An agent is not expected to be able to exert control against the principal on whose behalf he acts. We conclude that where excise goods are held outside of a duty suspension arrangement without duty having been paid, then a person controls those goods if he is able to assert control against all others who are not party to the illicit arrangements with which he is involved and which are the reason why the alcohol is outside a duty suspension arrangement.

116. Here the Appellant did not exercise control as against Bhai-Ji because the Appellant was acting either on the instructions of Bhai-Ji, or in concert with Bhai-Ji. Whatever the precise terms of the arrangements between them, the Appellant and Bhai-Ji acted together in an illicit arrangement to control the alcohol as against the rest of the world.

117. We conclude that in this case, the Appellant was able to exert control as against the Fletchers and the Respondents (and any other person who was not party to Bhai-Ji's illicit operation) because the Appellant was able to prevent all others from removing the alcohol from the unit. He exercised this control because he had a key to the side-door which excluded others from entering the unit, and he exercised this control because he is the only identified person who was capable of using the forklift truck to allow the shutter to be opened.

118. We also conclude that, at the time the alcohol was seized, the Appellant had the intention of exerting control over the alcohol as against others. When he arrived at the unit on 24 October 2017, the Appellant would have seen that the alcohol could not be moved out of the unit unless the forklift truck was moved away from the shutter, and he would have understood that no one else was able to move the forklift truck. By choosing to deny his involvement, and then waiting a further two hours before agreeing to move the forklift truck, the Appellant demonstrated his intention to retain an aspect of his control over the alcohol.

What is the relevance of others having access to the unit?

119. The Appellant argued that he was not the only person who had access to the unit and also it was not possible to identify whether the alcohol that was seized was the same alcohol that had been in the unit when he was last in physical possession of the unit.

120. These two submissions were based, in part on the Appellant's evidence that he only attended the unit two or three times a week and that he did not have a side-door key outside of his attendance at the unit (and travel to and from the unit). As we set out above, we have not accepted those parts of the Appellant's evidence for the reasons given.

121. Looking first at who had access to the unit, we consider it necessary to make the distinction between holding a key to the side-door, and having access to the unit. The Fletchers held a side-door key, and Mr Fletcher used that key to unlock the side-door to the unit at the request of the Respondents on the day the alcohol was seized. However, outside of that occasion, from the date the Fletchers let the unit to Manjit Singh, they did not have the right to use their side-door key to access the unit. Even though there was no written lease, at the most

basic level, Manjit Singh as tenant of the unit was able to exclude all others from the unit and that includes his landlord: the Fletchers. The Fletchers held a key but they did not have access to the unit.

122. The people who had the right to access the unit at the time the alcohol was seized were Bhai-Ji/Manjit Singh and all the people he trusted, including the people he trusted to work alone at the unit. We have found that the Appellant was one of these trusted people and that he held a side-door key for the purpose of accessing the unit. The Appellant is the only person working for Bhai-Ji/Manjit Singh who has been identified. Mr and Mrs Fletcher told the Respondents that other people also accessed the unit. These other people may have been acting in partnership with Bhai-Ji/Manjit Singh or they may have been acting on his instructions. But, in either case, they remain unknown.

123. We accept that the Appellant is right when he says he was not the only person who accessed the unit rented by Bhai-Ji/Manjit Singh. Bhai-Ji/Manjit Singh himself accessed the unit and, from what Mrs Fletcher said, others did as well. However, neither the Appellant nor the Respondents have been able to identify or contact any of the other people who had access to the unit. Therefore, the Appellant remains the only identified person who was exercising control over the alcohol at the earliest duty point identified by the Respondents. The Appellant remains liable for the excise duty on the alcohol he was holding even if it is the case that other people, who might also be liable with him, might also be assessed if they were also identified.

124. We have given consideration to the Appellant's submission that it was not possible for anyone to know whether the alcohol that was seized from the unit was the same alcohol that had been in the unit when the Appellant had last attended prior to the seizure.

125. We agree that the stock of alcohol would change from time to time. Although no other person has been identified as using the forklift truck, and it is only the Appellant (whose evidence we have largely not accepted) who said that another person used the forklift truck, we accept that, if another person working for Bhai-Ji/Manjit Singh used the forklift truck to move alcohol in or out of the unit after the Appellant had last used the forklift truck, then the alcohol seized would not be precisely the same as the alcohol left in place by the Appellant.

126. However, we do not consider that assists the Appellant. We have concluded that the Appellant and Bhai-Ji acted together in an illicit arrangement to control the alcohol as against the rest of the world. The Appellant had de facto control of the alcohol at times when he was not at the unit, and that includes in the moment immediately before the Respondents seized the alcohol.

127. So, even though the stock of alcohol could have changed, the Appellant exerted control over the alcohol that was in the unit at any given time. We do not consider that the changing of alcohol affects our conclusion that the Appellant was holding the alcohol that was seized and that he is liable to the excise duty that has been assessed.

THE PENALTY

128. In their Statement of Case, the Respondents stated that the penalty that had been imposed was a penalty for handling goods on which excise duty had not been paid. During the course of the hearing, Officer Musli's evidence threw that into doubt.

129. Miss Brown suggested that it might be possible to overcome the difficulty of the penalty bearing the wrong name if we were satisfied that the penalty notice misdescribed the type of penalty that had been imposed. However, that would require a situation where we were satisfied that there was a mistake in the penalty notice, rather than the penalty notice correctly describing the type of penalty that the issuing officer had intended to raise. Officer Musli's clear evidence was that there was no mistake in the penalty notice as he had intended to, and

had, issued a penalty to the Appellant for the Appellant's failure to notify liability. We have found, above, that in the months immediately after the seizure, the Appellant was compulsorily registered for VAT in respect of the supply of the alcohol seized from the unit, suggesting that at that time it was believed that it was the Appellant who supplied the alcohol from the unit. That VAT registration, the accompanying VAT assessment and another penalty, were subsequently cancelled but no change was made to the penalty under appeal.

130. The onus is on the Respondents. They must persuade us that it is more likely than not, that the penalty issued was for handling and that it was not issued for a failure to notify. Given Officer Musli's firm evidence on this point, we are not so persuaded. It was not argued, and we were not satisfied, that the Appellant met the criteria for a failure to notify penalty.

131. Therefore, the appeal against the penalty is allowed.

132. For completeness, had we been satisfied that the penalty imposed was a penalty for handling then we would have confirmed the penalty in the sum of £18,866. Despite the best efforts of Mr Gibbons, we were satisfied that all the necessary elements for such a penalty were met.

CONCLUSION

133. For the reasons set out above, the appeal against the assessment is dismissed, and the appeal against the penalty is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

134. 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.

JUDGE JANE BAILEY
TRIBUNAL JUDGE

Release date: 25th AUGUST 2023