Neutral Citation: [2024] UKFTT 00054 (TC)

Case Number: TC09036

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/04434

EXCISE DUTY – appellant holding excise goods outside a duty suspension arrangement where duty unpaid – whether HMRC held evidence sufficient to establish an earlier duty point – no – whether an earlier duty point could be established – no - liability appeal dismissed – whether appellant's behaviour "deliberate" – paragraph 6, Schedule 41 Finance Act 2008 – no-penalty appeal allowed and penalties reduced

Heard on: 25-26 September 2023
(written submissions on 19 October 2023)
Judgment date: 16 January 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
MRS HELEN MYERSCOUGH

Between

H TIDESWELL & SONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Sadiya Choudhury of counsel, instructed by Knights PLC

For the Respondents: Howard Watkinson of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant ("Tideswell") owns Unit 4 Hillside Industrial Estate, Draycott Cross Road, Stoke-on-Trent ("the Unit"). On 14 May 2019 the Respondents ("HMRC") seized non-UK duty paid cigarettes from Tideswell. On 13 May 2020 Tideswell was issued with two assessments for excise duty in the sums of £714,817 and £12,431 respectively. On 13 January 2021 Tideswell was issued with two excise wrongdoing penalties for £275,204.54 and £4,785.93 respectively. Tideswell appeals against both assessments (and we refer to this as the "Liability Appeal") and both penalties (and we refer to this as the "Penalty Appeal").

2. Where (as is the case here) there is more than one excise duty point in relation to the same goods, HMRC are required to assess excise duty against the first duty point they can establish on the evidence they hold. A person in the position of Tideswell (who holds, but is clearly not the first person to hold, excise goods on which duty has not been paid) can "escape" an excise duty liability if an earlier duty point can be established. On authority, the burden of proving that there has been an earlier excise duty point is on an appellant in a case such as this. The issue in the Liability Appeal is how the Tribunal should approach the "earlier duty point" issue given Tideswell's contention that there must have been an earlier duty point and HMRC (allegedly) "hold all the cards" when it comes to establishing an earlier duty point. That is the only issue in the Liability Appeal. Tideswell accepts (as it must) that the cigarettes were liable to duty which had not been paid and that it was holding the cigarettes.

3. As far as the Penalty Appeal is concerned, the issue is whether Tideswell's behaviour in holding the goods was "deliberate", that is to say whether it knew (or deliberately shut its eyes to the obvious risk) that the goods were excise goods on which duty should have been (but had not been) paid

THE FACTS IN OUTLINE

4. On the morning of 14 May 2019 HMRC Officers attended Tideswell's premises, a set of industrial units owned by Tideswell. Tideswell occupied the Unit for its purposes and kept machinery and a small office within it. When the HMRC Officers arrived Mr Julian Tideswell ("JT"), a director of Tideswell, was in the process of moving a pallet containing boxes of the cigarettes from racks in the Unit. Inside the Unit was a white Vauxhall van. Four boxes of Mayfair Blue cigarettes, containing a total of 40,000 cigarettes were found inside the van. Mr Stephen Woodcock was with the van and was arrested.

5. Thereafter, further boxes containing 2.3 million Mayfair Blue cigarettes were found on pallets on the right-hand side of the Unit and on a pallet in the centre of the Unit. All the cigarettes were seized under section 139 of the Customs and Excise Management Act 1979 ("CEMA") on the basis that they were reasonably suspected of being liable to forfeiture for being duty unpaid. That seizure has not been challenged. The retail value of the cigarettes was £1.17m.

THE EVIDENCE BEFORE US

6. We heard from a number of witnesses.

Mr Julian Tideswell ("JT")

7. JT is a director of Tideswell. He has devoted all his time and energy to developing Tideswell's site since 2017, when he ceased to be involved with a haulage company. He is responsible for the day-to-day running of Tideswell's business, which now comprises the rental of units to tenants and the rental of space on the site on which tenants and customers can park vehicles or put storage containers. JT was clear, in cross-examination, that Tideswell no longer runs a storage business; it simply lets out units and parking space.

8. On Saturday 9 March 2019, JT was contacted by a man who was interested in renting a unit on the site. This man who, at some point, said that his name was "John", called JT on his mobile phone having seen, he said, that number displayed on the company's sign. JT believes he was referring to the bigger of two signs located on the boundary of the Cheadle site which were used to advertise Tideswell's services. At that time there were no available units to rent. There was however space in Unit 4A, the unit which Tideswell occupies for its purposes. Unit 12 was in the process of construction and was expected to be ready shortly for occupation by a tenant. Unit 12 was not in fact finished until 2020. JT also believed that Unit 11 would shortly be available, as the tenant which occupied Unit 11 had been slow in paying a charge to cover the cost of utilities and JT expected that this tenant would shortly decide to move out. In the end, the tenant paid the amount outstanding and is still in occupation.

9. JT arranged to meet John at the Cheadle site the following day. JT recalls that the man drove onto the site, parked his car and walked across the site from the place he parked to the Unit, where JT was standing. John appeared to be in his mid-50's. He was wearing a jacket, jeans and shiny shoes. His dress was "smart casual". John had an Irish accent, but JT could not say whether it was a northern or southern Irish accent. John said that he wanted a small unit to rent. He said that he'd seen Tideswell's sign. John told JT that he was interested in renting a unit as he wished to have space to store offices supplies.

10. All goods stored in units at the Cheadle site come on pallets. John said that the number of pallets to be stored at any time would be 12 or so. JT said that he told John that there was nothing currently available except for the Unit and that, if he decided to rent it, he would have to share it with Tideswell, as Tideswell kept some machinery, including an air compressor, and a small office in the Unit. JT told him that that he would charge the usual rate for a small (i.e. 1,200 square foot) unit, that is £600 per month, and that when Unit 11 or 12 became available, he could move to one of those units. John went away saying that that he would think about the offer.

11. JT says he was not bothered, one way or the other, whether John accepted or not and that is why he did not give more favourable terms, i.e. a smaller rental charge on account of the fact that John would be renting part of a small unit rather than the whole of a unit. Mr Watkinson asked JT whether he thought it was odd that John was happy to pay for more space than he needed, but JT said that tenants often rent more space than they use. JT also gave John the number for Harrisons, a local company which also rents out storage space, to see if they could offer anything better. Mr Watkinson suggested to JT that it was odd that he never found out John's full name, but JT said that he thought he was dealing with Peter McGrath, to whom we will come in a moment..

12. On Friday 15 March 2019, JT received an email from mcgrathofficesupplies@gmail.com. The email was "signed" "Peter McGrath", whom JT concluded was a colleague or associate of John. JT had a subsequent email exchange with McGrath Office Supplies. JT's son Harvey Tideswell was helping out in the office that day, and he typed an email in reply on JT's instructions, providing confirmation of the terms of the rent, which were:

- A month's rent in advance, i.e. £600 plus VAT,
- A deposit of one month's rent i.e. £600 plus VAT,
- Two weeks rent to cover the last two weeks in March i.e. £300 plus VAT, and
- 10 weeks parking at £30 per week i.e. £300 plus VAT

13. On 15 March 2019, Peter McGrath emailed to say that he had arranged payment of £2,160, which Tideswell could expect to receive on 18 March 2019.

14. McGrath Office Supplies were never sent any lease agreement, which is usually what happens when a tenant takes up occupation of a unit. JT explained that this was because Tideswell expected to issue a lease agreement once a unit, other than the Unit, became available. JT says that Tideswell did not provide a storage service to McGrath Office Supplies. They were treated as tenants not customers of Tideswell. McGrath Office Supplies were bound to pay the same amount each month irrespective of the number of pallets it chose to store in the Unit. Mr Watkinson asked JT whether JT knew the full name of McGrath Office Supplies and whether it was a company or a sole trader. Had JT checked its identity or did it hold an address for it? JT agreed that he had not done this. He had the email address as a way of keeping in touch.

15. On 20 March 2019, Peter McGrath emailed to ask if the money had arrived in Tideswell's account and said that Tideswell could expect a delivery the next morning. JT checked the bank account online and confirmed by email that the agreed sum had arrived in the account. Later, he told Trevor Tideswell ("TT") that the £2,160 paid into Tideswell's bank account related to "McGrath Office Supplies" and TT noted, on the face of the bank statement when it arrived in the post, "John", the name of the contact, and "McGrath Office Supplies Invoice NO 3/2538A".

16. The next morning a lorry and trailer arrived. JT was there when it arrived. The lorry was refrigerated. JT recalls it had an Irish registration number plate. JT says that there is nothing unusual about a refrigerated lorry being used to transport goods which do not require refrigeration. The driver said that he had stopped over night at Alferton. The driver did not have an accent which JT recognised or can now recall. The driver did not have a forklift on his trailer, so JT used one of Tideswell's forklifts to lift 12 pallets from the lorry and put them in storage on racks in the Unit. It took 15 to 20 minutes to do this. JT did not charge for doing this job. He did it because the driver would not otherwise have been able to discharge his load and put it on the racks in the Unit where it was stored. JT was given a consignment note by the driver about which (JT says) there was nothing remarkable. The pallets contained cardboard boxes which were wrapped in plastic.

17. JT could not tell the weight of the pallets, as he fork-lifted them, simply that they were not particularly heavy. The forklift he used can lift between 1 and 2 tonnes, and one can only get the sense of the weight of pallets lifted when the weight gets close to the limit. There was nothing about the appearance of the pallets which indicated to JT that they did not contain, as claimed, office supplies. JT says that he never suspected, at any time before the arrival of HMRC enforcement officers on 14 May 2019, that the pallets contained cigarettes.

18. JT never gave the keys to the Unit to McGrath Office Supplies, who never sent anyone to accept delivery of goods. They had no machinery for loading at the Unit and (JT agreed) they were dependent on him for access as well as loading and unloading. He agreed that he was more involved with these goods than he would be with those of other tenants.

19. After that delivery, there were two visits by another man who came, on each occasion, in a white van. JT says he was never told this man's name by McGrath Office Supplies or the man himself. The first time the man came he said that he had come from Hull. This first visit was sometime in April. His second visit was on 14 May. On the first visit, JT fork-lifted a single pallet down from the rack and put it next to the back of the van the man had come in, and the man ripped the plastic away from the boxes on the pallet, and put the boxes into the back of the van. JT did not help him to do that and so did not hold any of the boxes. Prior to the man's two visits, he called to say that he would be coming the next day and was coming on

behalf of the owner. In neither case did anyone from McGrath call JT about the forthcoming visit. JT did not consider this odd. The man knew where the goods were, so clearly he must have been authorised.

20. On 14 May 2109, the man arrived, as expected. JT started to remove a pallet from the racks in the Unit as the man requested. Without warning, men who identified themselves as HMRC officers, arrived and arrested the man. JT says he was asked, voluntarily, to attend Stoke North Police Station, which he did. In cross-examination, Mr Watkinson put it to JT that, whilst he may not have been handcuffed, he was arrested, as indicated by the notes in HMRC officers' notebooks.

21. JT said that Tideswell does not undertake identity checks on its tenants. He is not aware of any legal obligation to undertake such checks and Tideswell has never received notice from any official source that it should undertake such checks. In his interview, JT told the officers Tideswell did not always take up references on tenants; it depended on how material their lease would be. If Tideswell thought there was a real risk of inadvertently renting its units to criminals, it would introduce such checks. Tideswell does not accept payment of rent in cash and JT said he would not expect criminals to pay rent by bank transfer as it would obviously be easy to identify the criminals as the holders of the bank accounts from which money was transferred. Mr Watkinson put it to JT that it was equally odd and risky to receive deposits into Tideswell's bank account not by way of bank transfer simply referring to the payer as "John". JT did not ask the bank about the deposit.

22. Mr Watkinson referred to JT's past involvement in the haulage industry. JT confirmed that he was familiar with documentation used in that industry, but was not aware of the risk of people using false documentation to cover the fraudulent movement of goods. He thought there was nothing unusual in the consignment note he signed for the goods. As far as he was concerned, they were "assorted goods". In his interview he had said that he thought the goods were office supplies, but that was down to the name of the consignee and McGrath Office Supplies. He agreed that he had never heard of the named consignor and, despite the name of the consignee being different ("Demploy Office Fulments"), he honestly thought the goods were meant for McGrath. Mr Watkinson also drew JT's attention to the fact that the place designated for delivery was in the Netherlands but the place and date for delivery was Stoke-on-Trent. That appeared rather odd. Also the delivery address ("11 Hayden Ind Est") was not correct. JT said that was the unit he was thinking of letting. Despite this, in his interview JT said he had looked at the paperwork closely. JT agreed that, although the consignment note referred to a packing list, there wasn't one. JT said it was not obvious to him that the consignment note was a nonsense. He signed the note accepting delivery on behalf of a company he did not work for without making enquiries. As he had said in his interview, JT said that the note referred to 12 pallets, which there were, and that was all he checked. In re-examination JT said that he had seen confused consignment notes before and sometimes goods (he referred to some milk powder he had stored) have no consignment note.

23. Mr Watkinson referred JT to the formal lease document Tideswell uses, which has a user clause. He put it to JT that this meant he was aware of the risk of people using units for illegal purposes. When interviewed by Officer Peacock, JT had said that he was not interested in what customers stored in their units. Mr Watkinson suggested that JT was trying to distance himself from knowledge of what was being stored. JT said that, especially now, he would keep an eye on what was stored.

24. At lunchtime on 14 May "Peter McGrath" sent an email to JT which reads, "Can you confirm if my driver has been." JT replied at 16:05 (after he had been released from the police station) "Yes your driver did turn up this morning, however we had a visit from customs and

excise at pretty much the same time and they have asked that I direct you to them." Mr Watkinson thought this a rather odd exchange. JT had just been arrested and interviewed at the police station, yet this is all he wrote. He did not ask Peter for any explanation of what had happened at all. He put it to JT that he knew the goods had been stored for an illegal purpose, or at best turned a blind eye, which was why he did not bother to remonstrate with Peter or ask what was going on. JT said he was brief because he isn't good with computers. He did not realise "it was something wrong" and, as he put it, that is why we are here.

Mr Trevor Tideswell ("TT")

25. TT is a director and shareholder of Tideswell. JT is the only other director and shareholder. TT said that Tideswell has always traded honestly and has never been the subject of an investigation for wrongdoing of any sort. It has always been cautious rather than risk-taking in the way it has changed and grown over-time. Tideswell has never borrowed money to develop the Cheadle site or to construct new units. The costs of development all come from Tideswell's profits which are, largely, retained rather than distributed to the shareholders.

26. TT continues to work for Tideswell but JT is responsible for the day-to-day operation of the business and has been for the last 10 years. TT's role is mainly to deal with the accounts of the business, but he occasionally helps out on site if need be. Tideswell only employs TT, JT and JT's mother. JT's mother assists on an ad hoc basis, as and when required. JT draws an income of £2,400 per month (including dividends) and TT draws an income of £1,800 per month. JT's mother draws an annual income of £12,000.

27. Since 2017, JT has devoted all of his time to Tideswell's business which is now solely the renting of units. Since acquiring the Cheadle site in 1978, Tideswell has gradually increased the number of units by constructing new ones, one by one, when the company has saved sufficient to finance the cost of building a new unit.

28. Tideswell used to supply storage services, but this has largely stopped now, and the business is mainly letting out units. The site "runs itself" and just needs maintaining. Tideswell has invested a lot in security. The site is very secure. It is surrounded by a big fence and there are CCTV cameras.

29. Tideswell rents the units to companies on leases. The leases take two forms. The bigger units are let through an agent, Louis Taylor, a firm of Chartered Surveyors, and the leases are detailed agreements, which are in Law Society format. The smaller units are let directly by Tideswell on much simpler and less formal agreements.

30. There are deliveries to units on the site around the clock every working day. Each tenant has the means of access to the main gates of the site, which are not supervised by Tideswell. 400 to 500 pallets come in and go out, on average, each week. There are between 30 and 40 deliveries and collections each week. There are approximately 25 pallets per delivery. Tideswell keeps three forklift trucks and will assist its tenants on an ad hoc basis, without charge, if they need help unloading or loading pallets, although most of the tenants have their own fork-lifts.

31. In addition to renting units Tideswell also supplies "yard storage" Yard storage is the rental of spaces for large vehicles or containers at the rate of £30 per week. Tideswell used to provide a storage service (as opposed to its current practice of renting units for storage). It would charge a certain amount for the storage of a pallet per week. Demand for the service dropped off over the years, but they still get occasional enquiries.

32. Tideswell gets most of its new tenants by means of a big sign on Draycott Cross Road The sign displays JT's mobile phone number and, typically, he receives a call a week from a prospective tenant. There is a rival company nearby which supplies a similar service called

Harrisons. If Tideswell do not have units to rent which suit prospective tenants, they suggest that they try Harrisons.

33. On 20 March 2019, Tideswell received a sum of £2,160 referenced "John". JT was told by TT that they had received the payment and what it was for. When TT received the bank statement in the post, he made a note on the bank statement "McGrath Office Supplies Invoice NO 3/2538A". TT agreed that it was not normal practice to have money paid into the bank account just with the reference "John". He agreed that it would be usual to have an address for a customer (for example, to issue a VAT invoice) but it was early days for this customer and they would obtain it "further down the line".

Chris Gunn ("CG")

34. CG is a Higher Investigation Officer employed by HMRC. He had been involved in this operation (codenamed "Operation Margaret" and which had been going on for some time) before 14 May 2019 working in intelligence development. Operation Margaret was focused around an individual (Mr Woodcock) HMRC believed was collecting illicit cigarettes for distribution. He was based in South Yorkshire and HMRC's objective was to identify his supplier by working back from him. CG accepts that the cigarettes must have come from somewhere else, but HMRC had not tracked them prior to their arrival at Tideswell's premises. HMRC's objective was to identify that route, but he was not aware that the route had been identified and then, after the raid, the case was handed over to a different team he was not part of.

35. CG briefed officers on 14 May 2019 in readiness for the "raid" on Tideswell's premises. In his second witness statement he says that "I was privy to intelligence in this matter and can confirm it did not permit HMRC to establish an earlier assessable duty point i.e. before [Tideswell] held the goods." HMRC were monitoring Mr Woodcock's van and expecting him to be on the move. They hoped he would go to Tideswell's premises. He confirmed in cross examination that his evidence was around Mr Woodcock collecting from suppliers to distribute and Tideswell's premises were where they found him collecting cigarettes. He is not able to say whether JT and Mr Woodcock were familiar with each other. He has seen no interaction between them.

36. Operation Margaret continued for a couple of days after the "raid" but then it was wound up and passed over to the investigations team. There would have been a "generic plan" to track back from Tideswell's premises to the earliest point of entry. Ms Choudhury asked whether CG knew what Mr Woodcock had said in his interview. CG said he believed Mr Woodcock had said he thought he was collecting washing powder. He did not know whether any mobile phones had been interrogated. That was after his involvement, which dwindled after 14 May. The investigations team would decide what to do next.

Eddie Ryszowski ("ER")

37. ER works for HMRC as a criminal investigator in the Fraud Investigation Service ("FIS"). He interviewed Mr Woodcock on 14 May 2019. He was not involved after that date and does not know anything about the subsequent investigation.

38. He was asked if he knew where Mr Woodcock was going with the cigarettes. ER said that Mr Woodcock had said that he was collecting washing powder.

Stephen Peacock ("SP")

39. SP is an HMRC officer. He has been employed as an excise caseworker in the Alcohol Team since 2015. He gave evidence about how he had investigated the case after the "raid" on 14 May 2019. He said that FIS pass cases on to his team to recover duty. He does not know if FIS completed their case. He did not speak to anyone in the investigations team, did not ask

for the interview transcripts (although FIS sent the transcript of the interview with JT in March 2020) and was not privy to other HMRC operations.

40. The case was referred by the FIS on 13 November 2019. SP was sent some basic material with the referral but had to request additional information and could only start his enquiry in March 2020. SP had some correspondence with JT, who replied the day before SP raised the assessment. SP said he raised the assessment as he was coming up against time limits, but he could always cancel it later. He also wrote to Mr Woodcock. SP's letter of 29 October 2020 records Mr Woodcock's account of his involvement:

> "You said that you were asked if you were interested in earning some extra cash delivering as you had access to a van. You stated that you were approached by a man in a pub about the job but cannot remember which pub or the name of the man.
>
> You also said you were contacted by a man whom you had never met about a delivering job, you have also said that you did not know this man's name either. You received instructions of where to pick up boxes and where to deliver them through a mobile phone, which was posted through your letterbox. You claimed that you did not know that there were cigarettes in the boxes and that you thought the boxes contained washing up liquid. You have claimed that you had no idea what you were involved in.
>
> I consider that the circumstances surrounding the procurement of the delivery job are not credible and should be called into question. Given the clandestine nature of the job that you were undertaking, I believe that you must have known that you were involved in criminal activity and that you were delivering illicit goods, certainly not washing up liquid."

41. SP does not know if anyone interrogated JT's mobile phone.

42. On 13 March 2020 SP was sent images of a Convention relative au Contrat de Transport International de Marchandises par Route ("CMR") transport document from FIS. He inspected the handwritten CMR document. The document was signed by JT. The goods were listed as 12 pallets of 'assorted goods' The consignor listed on the document was Van Loo Logistics with Fooigal TSP listed as the transporter. After searching for the delivery address on the internet he concluded that the delivery address was fictitious. He was also unable to find the company name at Companies House. On 13 March 2020 he wrote to Fooigal TSP to request further information regarding the seizure of goods and their involvement. To date SP has not received a response from this company. On 13 March 2020 he wrote to Van Loo Logistics to request further information regarding the seizure of goods and their involvement. On 16 March 2020 he received an email from Van Loo Logistics advising him that the case did not affect them as they were not in the UK at the time. They also requested further documentation so they could prove it did not concern them. On 25 March 2020 SP replied to Van Loo Logistics, advising them that there was no other documentation available. He further advised them that they did not need to take any further action because he was satisfied they were not involved. He made a further request to Van Loo Logistics on 30 November 2020, but did not receive a response to this request. Following the checks that he carried out on the CMR, he concluded that it was a fraudulent document.

43. Suspicious features of the CMR included the absence of any official stamps. Also, SP would expect the handwriting in the boxes on the form to be different, which does not appear to be the case here. He explained that a CMR travels with consignments of goods and different parts are filled in by different people.

44. SP carried an open-source internet search for 'McGrath Office Supplies'. He found a business named McGrath Office Supplies based in Belfast, Northern Ireland and issued an information request letter to the postal address of the business as shown on their website.

45. SP attempted to contact Peter McGrath using the telephone number provided by JT, the call did not connect and appeared to be a 'dead line'. On 12 May 2020, SP received a response from McGrath Office Supplies in Belfast, Northern Ireland. The email was from Peter McGrath of McGrath Office supplies, who advised their business was a small stationery shop based in Belfast, Northern Ireland and only supplied local companies. Mr McGrath said he had never heard of Tideswell and that McGrathofficesuppliesni@gmail.com was not their email address SP further contacted McGrath Office Supplies on 19 February 2021 for details of any supply orders dated 21 March 2019 but has not yet had a response.

46. SP said that he checked the CMR form to see if he could establish an earlier duty point, including by contacting the businesses identified on the form. He did not check internally with FIS. He obtained materials from CG but was not privy to any operational matters.

THE LIABILITY APPEAL

The Legal Framework

The EU Legislation

47. Directive 2008/118 EC ("the Directive") laid down general arrangements for harmonising excise duty across the EU.

48. Article 7 of the Directive provides that:

> "1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.
>
> 2. For the purposes of this Directive, "release for consumption" shall mean any of the following: …;
>
> (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;"

49. Article 8 of the Directive states:

> "1. The person liable to pay the excise duty that has become chargeable shall be: …
>
> (b) 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; …
>
> 2. Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt."

50. In Case C-325/99 *G van de Water v Staatsecretaris van Financien* [2001] ECR I-5163 the ECJ noted, at [41], in relation to the predecessor directive to the ED, that national authorities must ensure that an excise duty tax debt is collected. Following *van de Water* the Upper Tribunal has held that it is the duty of national authorities to ensure that excise duty is levied and paid where goods in respect of which duty has not been paid are found to be circulating within the EU. Otherwise, there will be a distortion of the internal market if goods in respect of which duty has not been paid are circulating freely alongside goods where duty has been paid; *HMRC v B&M Retail Ltd* [2016] UKUT 429 (TCC) ("B&M"), at [115], *Davison & Robinson Limited v HMRC* [2018] UKUT 437 (TCC) ("*Davison*"), at [63].

Domestic legislation

51. In domestic law cigarettes are excise goods subject to excise duty under section 2(1) of the Tobacco Products Duty Act 1979.

52. The Finance (No. 2) Act 1992 provides the authority for regulations to implement the Directive in the UK. Those regulations are the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 ("the Regulations")..

53. Under regulation 5 of the Regulations there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.

54. Under regulation 6:

> "(1) Excise goods are released for consumption in the United Kingdom at the time when they: …
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement; …."

55. Under regulation 10(1) the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) "is the person holding the excise goods at that time". Under regulation 10(2) "any other person involved in the holding of the excise goods is jointly and severally liable to pay the excise duty with the person specified in [Reg.10(1)]".

"Holding"

56. The concept of "holding" goods appears at numerous points in the Directive and the Regulations. There has been a series of domestic authorities in relation to "holding" that were canvassed in *Dawson's Wales Ltd v HMRC*, [2019] UKUT 296 (TCC). However, those authorities have been overtaken.

57. In *HMRC v WR* (Case 279/19) the CJEU addressed Article 33 of the ED in relation to excise goods which have already been released for consumption in one Member State and are held for commercial purposes in another Member State. The CJEU held that Article 33 of the Directive must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty. Actual or constructive knowledge of the smuggling of goods is therefore irrelevant to liability to excise duty (*HMRC v Perfect* [2022] EWCA Civ 330, at [23]). In other words, there is no "innocent agent" exception in relation to "holding" for the purposes of liability to excise duty. Tideswell's appeal originally included an argument that it was an "innocent agent" and so it was not fair, proportionate or reasonable to assess it. That argument has been abandoned in view of the Court of Appeal decision in *Perfect*.

Seizure and Forfeiture

58. Section 139 CEMA permits seizure by HMRC of anything reasonably suspected to be liable to forfeiture. Paragraph 3 of Schedule 3 to CEMA provides that a challenge to a seizure must be made within a month. In default of such a challenge the goods are deemed by paragraph 5 of Schedule 3 to CEMA to have been duly condemned and forfeited.

Assessment

59. Under section 12 (1A) Finance Act 1994 ("FA94") HMRC may assess excise duty on a person where it appears to them (a) that any person is a person from whom any amount has become due in respect of any excise duty, and (b) that they can ascertain that amount.

60. Although section 12 provides that HMRC "may" raise an excise duty assessment, the CJEU in *Perfect* (at [66]) made it clear that HMRC have no discretion here. They must assess the person they find holding the goods, if that is the only duty point which can be established. The CJEU commented that, although fairness and proportionality are cornerstones of both EU law and the common law, the underlying policy of the Directive (that the excise duty due should be collected) meant that there was strict liability. This was discussed further by the FTT (Judge Scott) in *Paul Eveleigh v HMRC*, [2023] UKFTT 256 (TC), which also held that an assessment could not be challenged on the basis that it was disproportionate (even where the goods had been forfeited and Mr Eveleigh's vehicle had been seized) and that an assessment for excise duty where goods are forfeit is not a penalty.

61. It is clear that, as the concept of holding of a product subject to excise duty outside a suspension arrangement without the duty having been paid constitutes a "release for consumption" (*G van de Water v Staatsecretaris van Financien* (Case C-325/99)), there can be more than one release for consumption in respect of the same goods. However, there clearly cannot be multiple liabilities to excise duty in respect of the same goods and it is accepted that there can only be one assessable duty point.

62. It is now accepted as a matter of law that HMRC is obliged to assess against the earliest duty point they can establish on the evidence they have. In *Davison & Robinson Ltd v HMRC*, [2018] UKUT 437 (TCC), the issue before the Upper Tribunal was whether it is open to HMRC to assess a person who is found to be holding excise goods, in respect of which the holder cannot demonstrate that the duty has been paid, in circumstances where a prior event which would entitle HMRC to make an assessment on somebody else must have occurred, but where, when, how and by whom that event occurred cannot be established. They said:

> "[79] In this regard, Mr Beal accepted in argument that, as a matter of law and not merely as a matter of HMRC's discretion, HMRC were obliged to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement. In *B&M* the Upper Tribunal appeared to have proceeded on the basis that the question as to who should be assessed where there had been a series of circumstances which could have led to an assessment was purely a matter of HMRC's discretion, which could only be challenged through the medium of judicial review: see [150] to [153] of the decision.
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> [80] We accept that the position is as accepted by Mr Beal. It is consistent with our analysis that the Directive requires an assessment to be made against the first established excise duty point."

63. HMRC cannot make an assessment until it has the necessary information to do so. In the absence of any relevant information in relation to any prior duty point, HMRC must assess the person it finds to be holding the goods. At [67] the Upper Tribunal observed:

> "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."

64. This does not mean that a person found holding goods will always be liable to excise duty. What it does mean is that quite a lot needs to be established before the holder can successfully challenge an assessment. As the Upper Tribunal observed in *Dawson's (Wales) Ltd v HMRC*, [2019] UKUT 296 (TCC) (at [149]):

> "In summary, in circumstances where HMRC seek to assess the person found to be holding excise duty goods in respect of which duty has not been paid pursuant to regulation 10(1) of the Regulations and that person challenges the assessment on the basis that an earlier excise duty point can be established against which the assessment should be made, for that challenge to be successful it will be necessary to establish:
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> (1) Who had physical possession at the time that the alleged earlier excise duty point occurred. For example, the earlier excise duty point might be established immediately before the goods concerned were delivered to the premises of the subsequent holder, by reference to the physical possession of the courier delivering those goods.
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> (2) Who is the person alleged to have de facto or legal control over the goods who it is said should be assessed rather than the subsequent holder (if it is the case that the courier was an innocent agent and it is not appropriate to assess the courier), and how that person is said to have such control and the basis on which it was being exercised. For example, the terms of supply to the person alleged to have de facto or legal control might mean that in fact that person never had control of the goods and did not direct their delivery. Control might have been exercised by another entity earlier in the chain of supply in compliance with a request by the person in question to deliver them to the subsequent holder. Alternatively, for example, the terms of supply to the subsequent holder, including where relevant the operation of the Sale of Goods Act or the Convention (see para 124 above) might mean that the goods were already under the control of the subsequent holder while in transit to him.
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> (3) The time at which the excise duty point arose. Whilst precise temporal exactitude is not essential (see, for example, *Revenue and Customs Comrs v Jacobson* [2018] UKUT 18 (TCC) at [46]), in our view the date of an invoice is not sufficient in itself without establishing who was in possession of the goods at some identified point or points in time. In that context, and as already indicated, the terms of the relevant sale may be relevant, in particular as to when delivery is deemed to have occurred. Copies of CMRs, if they can be obtained, may be relevant.
>
> (4) Where the goods were being held at the relevant time. In the case of goods being transported, that could be by reference to the means of transport or the location of that means of transport at some point in time, possibly immediately prior to the delivery of the goods at a particular location. We do not consider that the goods need necessarily to be shown to have been static at a particular place at a single fixed point in time (again, see Jacobson). For example, in the case of means of transport the transport used, the start and/or end points of the journey and a defined period of time within which it must have occurred might be identified."

65. The Court of Appeal agreed ([2023] EWCA Civ 332 at [84] and [94]) that factors (1), (3) and (4) were factors to be taken into consideration where an assessment is challenged on the basis that an earlier excise duty point can be established. DWL did not take issue with factor (2). The Court of Appeal also confirmed (at [94]) that, in the circumstances of that case, the burden of proof is on DWL.

66. Up to this point, there is broad agreement between Tideswell and HMRC on the way the law operates. In particular, Tideswell accepts that, as it was holding the goods, it is the person to be assessed unless an earlier duty point can be identified and that it bears the burden of proof of that. However, Tideswell goes on to assert that, while the burden of discharging the assessments remains on it throughout, the evidential burden on whether there was an earlier

excise duty point has shifted to HMRC. This is because HMRC is the only party which has the evidence on this issue available to it and which HMRC have chosen not to adduce.

67. This difficulty (that an appellant carries the burden of proof of an earlier duty point but HMRC is likely to be in a much better position so far as having access to evidential material is concerned) is one that has exercised the Tribunal in a number of cases. In *Paul Murphy v HMRC*, [2021] UKFTT 204 (TC), the Tribunal discharged an assessment to excise duty on a "mere courier" (albeit one who knew that the goods he was carrying were counterfeit goods) on the basis that the excise duty rules "must be fair and proportionate in their effect", that levying excise duty on seized goods "operates as a deterrent and penalty [and a]ll penalties must be fair and proportionate" and, as "[t]here must have been an earlier excise duty point … but HMRC failed to carry out a proper investigation to establish whether such an appropriate excise duty assessment could be properly raised", an assessment on Mr Murphy alone would not be fair or proportionate.

68. This case has been the subject of some criticism. In *Charlene Hughes v HMRC*, [2022] UKFTT 400 (TC), the Tribunal noted that *Murphy* predated the CJEU/Court of Appeal decisions in *WR/Perfect*, which make it clear that the imposition of strict liability does not offend the principles of fairness and proportionality. It is also inconsistent with *Paul Eveleigh*, where the Tribunal held that an assessment could not be challenged on the basis that it was disproportionate (even where the goods had been forfeited and Mr Eveleigh's vehicle had been seized) and that an assessment for excise duty where goods are forfeit is not a penalty. The decision in Murphy is also inconsistent with the Upper Tribunal decision in *Butlers Ship Stores Limited v HMRC*, [2018] UKUT 58 (TCC), where Lady Wolffe held that the existence of strict liability for excise duty was inimical to the existence of any discretion on HMRC's part and also that, where appeals under section 16(5) of the Finance Act 1994 (which is the case with this appeal) are concerned, it is no part of the tribunal's role to consider the reasonableness of the decision under review, in contrast to the position with appeals under section 16(4). Mr Watkinson submitted that *Murphy* was shot through with error and should be ignored. Ms Choudhury did not seek to defend that decision or to rely on it before us, nor did she suggest that HMRC had any discretion when it came to assessing excise duty or that there was any scope for us to review the reasonableness (or not) of their decision to assess Tideswell.

69. Whilst the decision in *Murphy* may be questionable, the concerns which clearly exercised the Tribunal in that case are not. In *B & M Retail Ltd v HMRC*, [2016] UKUT 429 (TCC), the Upper Tribunal made these observations (at [153]):

> "B & M are, it appears, troubled in this case that HMRC are not following their own stated policy in certain respects: … B&M wish to be satisfied that there are not in fact earlier points in the supply chain where an excise duty point could clearly be established on the evidence, or might be if such an investigation were in their view more vigorously pursued. 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 the evidence to displace its liability, when the evidence that HMRC do actually have is in fact sufficient to demonstrate, objectively, that an earlier excise duty point could be established. We are in no position, however, to say whether that is the position in the present case, and any concerns of that nature would anyway have to be pursued through the medium of judicial review."

70. To compound the problem, the more of an "innocent agent" someone in Tideswell's position is, the less likely they are to be able to identify an earlier duty point. We should be clear, as we were with Ms Choudhury and Mr Watkinson, that we too were exercised by this concern.

The burden of proof and the evidential burden generally

71. This brings us to Ms Choudhury's submissions on the shifting of the evidential burden. Because this was Tideswell's only real ground in the Liability Appeal and the issue had not been developed in skeleton arguments, we asked for written submissions from Ms Choudhury and Mr Watkinson on the evidential burden (so that we could be completely clear about their arguments) and also on whether our concern about appellants in Tideswell's position could be addressed through disclosure requirements under rules 5(3)(d) or 16(1) of the Tribunal Procedure (First-tier Tribunal) (Tax) Rules (the "FTT Rules"). Rule 5(3)(d) allows the Tribunal to make a direction to require a person to provide "documents, information or submissions", and rule 16(1) allows it to require a person to attend as a witness or to answer questions or produce documents.

72. Ms Choudhury describes the evidential burden as a principle of the law of evidence as opposed to a more general rule of law. In *Brady v Group Lotus plc* [1987] STC 635, Mustill LJ (in the majority in relation to the legal burden of proof) stated at 643f-h:

> "Although this term [the 'evidentiary burden of proof'] is widely used, it has often been pointed out that it simply expresses a notion of practical common sense and is not a principle of substantive or procedural law. It means no more than this, that during the trial of an issue of fact there will often arrive one or more occasions when, if the judge were to take stock of the evidence so far adduced, he would conclude that, if there were to be no more evidence, a particular party would win. It would follow that, if the other party wished to escape defeat, he would have to call sufficient evidence to turn the scale. The identity of the party to whom this applies may change and change again during the hearing, and it is often convenient to speak of one party or the other as having the evidentiary burden at a given time. This is, however, no more than shorthand, which should not be allowed to disguise the fact that the burden of proof in the strict sense will remain on the same party throughout – which will almost always mean that the party who relies on a particular fact in support of his case must prove it."

73. The evidential burden was considered by the FTT in *Royal Borough of Kensington & Chelsea v HMRC* [2014] UKFTT 729 (TC), where the tribunal was referred to the Court of Appeal's decision in *Wood v Holden*, [2006] EWCA Civ 26, in which the Court upheld Park J's decision that, after the appellants had produced evidence to show that the amendments made to their self-assessments were wrong (because the company whose shares they had disposed of was resident in the Netherlands), the evidential burden passed to HMRC (who contended that the company in question was UK resident). Other examples of the FTT accepting that the evidential burden had shifted from one party to the other, notwithstanding the legal burden of proof, include *Distinctive Care Ltd v HMRC* [2016] UKFTT 764 (TC) at [33] (citing *RKBC*) and *Wroe & ors v HMRC* [2022] UKFTT 143 (TC) at [107].

74. In response to this, Mr Watkinson submits that the legal and evidential burden of proof in this appeal is on Tideswell to establish the four factors necessary for there to be an earlier duty point. He submits that Tideswell has not established any of those points. Instead, Tideswell seeks to side-step that burden, and place it on HMRC, firstly by asserting that the evidential burden of proof somehow shifted, and secondly by asserting that HMRC have the evidential burden of proof because they are the only party which has the evidence on this issue available to it and they have chosen not to adduce that evidence.

75. On the evidential burden generally, Mr Watkinson submits that where a court or tribunal does consider a shift in evidential burden (i) that requires a prima facie case to be established by the party with the burden of proof, and (ii) that cannot disguise the fact that the burden of proof remains on that party throughout. He says that is apparent from the passage in *Brady*

cited by Ms Choudhury (and reproduced above). Here, Tideswell has not established by its evidence even a prima facie case of any of the four factors needed to find an earlier duty point. Absent such a prima facie case being made out there can be no shift of the evidential burden to HMRC.

76. As to Tideswell's second assertion, that the evidential burden was always on HMRC because they were the only party with evidence on the four factors, Mr Watkinson submits:

> (1) Firstly, if Ms Choudhury is correct, this simply has the effect of completely reversing the burden of proof, and as a matter of principle that cannot be right.
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> (2) Secondly, Tideswell was involved in the goods and had evidence from which it could have made enquiries. There is no evidence of Tideswell making any enquiries, whatsoever, of those with whom it was involved, or making any enquiries as to whether its CCTV footage could be recovered. It is not the case that only one party has knowledge or evidence, or can obtain evidence, relevant to the issue to be determined. Tideswell was demonstrably involved with the goods and had relevant knowledge of them, had relevant evidence about them, and could have obtained further relevant evidence about them.
>
> (3) Thirdly, the argument is predicated on an assumption that HMRC in fact themselves have the evidence to establish an earlier duty point. There is no proper basis for such an assumption. The mere fact that there was an investigation does not permit the Tribunal to leap to a conclusion that that HMRC in fact actually have the evidence to establish an earlier duty point
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> (4) The principle can have no role where it is open to the party that claims to have no knowledge or evidence of the matter in issue to make an application for a direction from the Tribunal for disclosure of the material held by the other party. HMRC submit that it is an ample safeguard for appellants in these types of cases that they can seek a direction from the Tribunal for disclosure of evidence in HMRC's possession that would establish an earlier duty point. It is difficult to see circumstances in which a Tribunal would refuse such an application where it was properly made. Where an appellant believes that, despite requests, HMRC has not disclosed such material that is an obvious application for an appellant to make. No such application was made in this case.

77. In response to Mr Watkinson's final point, Ms Choudhury submitted that no application for disclosure was made under rules 5(3)(d) or 16(1) of the FTT Rules because of assurances given by HMRC that they would be providing the further information in respect of the existence of an earlier excise duty point Tideswell's legal representatives had asked for. This was meant to have been in SP's witness statement, but when filed it did not cover the relevant points. When Tideswell's representatives queried this, it led to HMRC applying to admit CG's second witness statement. Ms Choudhury submits that asking HMRC to disclose any information it considered would show the existence of an earlier excise duty point was a reasonable and proportionate course of action and a necessary precursor to making an application for specific disclosure. In the event, this explanation was not provided at any stage prior to the hearing, despite HMRC indicating their willingness to respond to Tideswell's queries and was only provided by CG in the course of his oral evidence, of which Tideswell had no prior warning.

78. *RKBC* involved a claim by RKBC under section 80 Value Added Tax Act 1994 to recover amounts mistakenly paid as VAT on building control fees. It was accepted by HMRC that local authorities were not liable for VAT on such fees charged in relation to commercial properties and two methods were agreed for processing claims for overpaid VAT. The method ("Method 2") RKBC was using worked like this:

> Applicants for refunds [i.e. businesses that had paid relevant fees] apply, or are referred by local authorities, to HM Customs and Excise who will be acting on behalf of the relevant local authorities to process and pay claims for refunds of tax and statutory interest. Local authorities will need to authorise HM Customs and Excise to make the payments direct to the claimants.

79. The FTT held that this method operated as a waiver of RKBC's section 80 right to recover overpaid VAT only in respect of claims actually made and the issue that gave rise to, in the context of deciding what claims RKBC could now make in its own right, was whether the burden was on RBKC to prove what claims were not made (which HMRC contended) or on HMRC to prove what claims were made (as RBKC contended), and whether the burden of proof was discharged. The particular problem in that case was that, as claims were made directly to HMRC by third parties, RKBC never knew what claims had been made. Claims were made to HMRC, but HMRC had destroyed all its relevant records and evidence. RKBC argued that HMRC were relying on the "Method 2 agreement" as a defence to RKBC's claim, and so the burden of proof lay on it. Alternatively, RKBC argued that, even if the legal burden remained with RBKC on this point (to justify the repayment claims it was making), the evidential burden had shifted to HMRC (it being common ground that RBKC had discharged its own initial burden to prove the amounts mistakenly paid as VAT). Under the heading "Discussion: burden of proof", the FTT observed:

> "60. We find, for the reasons advanced by both parties, that RBKC never had evidence or knowledge of any relevant applications having been made to HMCE (or HMRC).
>
> 61. We accept that HMRC were the only ones (as between the parties) who would have held such evidence and had such knowledge. We accept too that HMRC no longer have evidence of any relevant applications having been made to them, because they destroyed any evidence they may have held. …. However, that does not alter the fact that HMRC were the only ones who, as between the parties, would have held the evidence in the first place.
>
> 62. We do not accept Mr Shepherd's submission that the fact that HMCE (or HMRC) were not obliged to retain such evidence beyond six years means that they do not bear the evidential burden of proving what relevant applications were made. Of the two parties, HMRC were the only ones to have ever held such evidence, or to have had knowledge of relevant applications having been made. It would be unreasonable, and unjust, to expect RBKC to adduce evidence of relevant applications not having been made (quite apart from the obvious difficulty of requiring them to prove a negative).
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> 63. The factors set out at paragraphs 60 to 62 above suffice, in our judgment, for the evidential burden to have shifted to HMRC in light of *Wood v Holden*.
>
> …
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> 66. For these reasons, as well as those advanced by Mr Vallat, we find that the evidential burden was on HMRC to prove what "relevant applications" were made, rather than on RBKC to prove what "relevant applications" were not made.
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> 68. Mr Vallat reminded us that paragraph 32 of *Wood v Holden* holds that we can decide the appeal on the basis that the burden of proof has not been discharged, but only as a last resort. He submitted that the present case does require us to take the course of last resort, that is, to decide that HMRC's burden of proving that "relevant applications" have been made has not been discharged, rather than requiring a positive decision that there have been no such applications.

> 69. HMRC's position was that "having opted for Method 2, under the balance of probabilities, any 'Fleming' claims [that is, "relevant applications"] that have been submitted, are very likely to have been repaid already either in full or in part under the process agreed between the Local Authorities and Customs & Excise". That does not however address the material question of whether any claims were submitted in the first place.
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> 70. We find, based on HMRC's own evidence (set out above), that they had by the time of the hearing no evidence of any "relevant applications" having been made. We accept that any destruction by HMRC was not done in bad faith and Mr Vallat retracted his initial suggestion (based on an earlier HMRC document) that HMRC had declined to produce the evidence. Nevertheless, the evidence was not there.
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> 71. It is clear therefore, and we find, that HMRC have not discharged the burden of showing what "relevant applications" were made within the meaning of that phrase in the Method 2 agreement. We agree with Mr Vallat that this is a case where it is appropriate to find that the burden was not discharged."

80. The FTT in *RKBC* referred to the decision of the Court of Appeal in *Wood v Holden*, [2006] EWCA Civ 26. As summarised by the FTT, the taxpayers had entered into a scheme to mitigate the charge to capital gains tax under section 86 of the Taxation of Chargeable Gains Act 1992 on the disposal by the taxpayers of their company. The case turned on the residence of a company, Eulalia, incorporated in the Netherlands. HMRC had charged capital gains tax, finding that Eulalia was resident in the UK for tax purposes. The Special Commissioners had dismissed the taxpayers' appeal, holding that the taxpayers had not established that Eulalia was not resident in the UK for tax purposes. The taxpayers appealed to the High Court, which reversed that finding, upholding the taxpayers' appeal. HMRC appealed to the Court of Appeal, which found for the taxpayers.

81. The Special Commissioners in *Wood v Holden*, appear to have decided the case (at least in part) on the basis that the taxpayers had not satisfied them that Eulalia was not UK tax resident. Park J thought that they were wrong to have done so in the light of the state of the evidence before them. The Court of Appeal agreed, holding:

> "[30] The judge noted that the special commissioners had expressed their conclusion as to the central management and control of Eulalia (at paragraph 145 of their decision) in terms which suggested that they had based that conclusion on what they saw as the taxpayers' failure to discharge the onus which was placed upon them by section 50(6) TMA 1970. As the special commissioners had put it: "the Appellants have failed to satisfy us that the central control and management was not in London from 18 July 1996 when CIL became its shareholder". The judge accepted that the special commissioners had been correct, in principle, to approach the matter on the basis that it was for Mr and Mrs Wood to show that the amendments made to their self-assessments in October 2001 had been wrongly made. He said this, at paragraph [59] of his judgment:
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> > "[59] I wish to say more about the way in which the Commissioners have based their decision on what they see as the failure of Mr and Mrs Wood to discharge the burden of proving a negative. I accept, despite a submission of Mr Goldberg to the contrary, that, when an Inspector of Taxes makes an adjustment to a taxpayer's self-assessment and the taxpayer appeals against the adjustment, the statutory burden on appeal rests on the taxpayer to show that the adjustment is wrong. That is the effect of s.50(6) of the Taxes Management Act 1970:

'If, on an appeal, it appears to … the Commissioners … by evidence – (c) that the appellant is overcharged by an assessment … the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good."'

But he went on (*ibid*):

" . . . However, there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue."

The judge's conclusion at paragraph [63] must be read with those observations in mind.

[31] At paragraph [63] of his judgment the judge said this:

"[63] . . . in so far as the Commissioners decided this appeal against Mr and Mrs Wood on grounds relating to the burden of proof (and the opening part of paragraph SC145 suggests that those were the critical grounds for the decision), I consider that they were in error."

He could not have been intending to suggest, in that paragraph, that the special commissioners had been wrong in principle to approach the matter on the basis that it was for Mr and Mrs Wood to show that the adjustments to their self-assessments had been wrongly made. Rather, I think, he was stating his conclusion that the special commissioners had been wrong in failing to appreciate that the evidential burden had passed to the revenue in the present case. He had set out his view of the position at paragraph [60]:

"[60] In this case, at the beginning of the appeal before the Special Commissioners the position was that the Revenue had made an adjustment on the basis that Mr and Mrs Wood were liable to CGT, and that Mr and Mrs Wood had to show to the civil standard of proof that the adjustment was wrong. I accept that the onus was on them to show that Eulalia was not resident in the United Kingdom, but rather was resident in the Netherlands. [Park J then set out what Mrs and Mrs Wood had shown and went on] Surely at that point they can say: 'We have done enough to raise a case that Eulalia was not resident in the United Kingdom. What more can the Special Commissioners expect from us? The burden must now pass to the Revenue to produce some material to show that, despite what appears from everything which we have produced, Eulalia was actually resident in the United Kingdom."

[32] As the judge pointed out, the revenue had produced no positive material to show where the central control and management of Eulalia was. It was not enough (as the judge thought) for the revenue to criticise the lack of evidence from some of those at Price Waterhouse and ABN AMRO who had been involved in the transaction in 1996. The special commissioners had said that they would not have been assisted, to any material extent, by oral evidence of events then some seven years in the past. Nor was it enough to demonstrate, as counsel for the revenue had done convincingly, "that the steps taken were part of a single tax scheme, that there were overall architects of the scheme in Price Waterhouse, and that those involved all shared the common expectation that the various stages of the scheme would in fact take place". As the judge observed, those matters were not denied. Taken together they did not, of themselves, lead to the conclusion that Eulalia was resident in the United Kingdom."

82. The Court of Appeal held that, although there can be exceptional cases where a judge can only decide a case on the basis that the party on whom the burden of proof lies has failed to discharge that burden, this was not one of those cases.

83. Although *Wood v Holden* was prayed in aid in *RKBC* in reaching its conclusion that the evidential burden had shifted (see paragraph [63] of the *RKBC* decision), we see *RKBC* as an example of the evidential burden shifting for a different reason. As we have just seen, Park J and the Court of Appeal considered that Mr and Mrs Wood had done enough to raise a case that Eulalia was not UK resident, such that (although the burden of proof always rested with them) the evidential burden had shifted to HMRC (so that they had to displace the prima facie case the Woods had established). RKBC, on the other hand, needed to establish its entitlement to reclaim overpaid VAT. To do that, it needed to show (as it had done) that it had overpaid VAT and then it needed to show that no reclaims had been made by businesses in relation to the VAT it was reclaiming. Although we could not find an express statement to this effect, the FTT seem to have accepted that the burden of proof was on RKBC to establish this. Apart from anything else, if they had thought that the burden of proof was on HMRC to establish that claims had been made by businesses, they would have said so and the evidential burden point would then not have been irrelevant. The FTT clearly seem to have accepted that the burden of proof (that no relevant claims had been made) was on RKBC, but the evidential burden had shifted to HMRC; see, for example, the comments at [63] and [66]-[67]. As HMRC could not produce any evidence (because they had destroyed it), that was the end of the matter.

84. Looking at the other cases Ms Choudhury cited, *Distinctive Care Ltd v HMRC*, [2016] UKFTT 764 (TC), was concerned with a claim for costs on the basis of unreasonable behaviour by HMRC. One question relevant to the unreasonable behaviour issue was when HMRC's Central Policy team ("CenPOL") had changed their view on a particular issue. In relation to this, Judge Mosedale commented (at [33]):

> "There was a dispute as to when CenPOL changed its view and in particular whether it was before or after the decision and review decision at issue in this appeal. I had no evidence on this: Mr Kane [the HMRC officer] simply did not know. Ms Choudhary's view was that if it was the appellant's proposition that CenPOL changed its view before the information notice was issued, then the appellant had the burden of proof: Mr Firth said HMRC had the burden of proof on this as only HMRC could possess the evidence of this. I agree with the appellant over this for the reasons given by the FTT in the decision of *Royal Borough of Kensington & Chelsea* [2014] UKFTT 729 (TC) at§§60-63. So I find the change of view was sometime before the issue of the information notice as HMRC were the only party who could have known the truth on the date of the change and they adduced no evidence on it."

85. *Wroe & ors v HMRC*, [2022] UKFTT 143 (TC), concerned an aspect of the transactions in securities legislation, namely who must bear the burden of proof as to whether the purpose of the taxpayer in entering into a transaction was to obtain a tax advantage. In relation to this, Judge Brannan observed (at [104]-[109]):

> "104. Previous iterations of the Transactions in Securities legislation made it clear that the burden of proof lay upon the taxpayer to demonstrate that its purpose was not to obtain an income tax advantage (see, for example, section 703(1) Income and Corporation Taxes Act 1988 and section 685 Income Tax Act 2007 as in force prior to 24 March 2010).
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> 105. However, the current wording of section 684(1) is silent as to who must demonstrate the requisite purpose of being a party to the transactions in securities. A number of commentators consider that the burden of proof now lies upon HMRC. This is a curious result, because the main purpose of the

> person who is a party to a transaction in securities, the test being a subjective one, will be a matter which is primarily within the knowledge of the taxpayer rather than HMRC.
>
> 106. In his submissions, Mr Elliott addressed this issue. First, he noted that in HMRC's Statement of Case it was said: "The burden of proof lies with HMRC to show that the main purpose, or one of the main purposes, of the transaction was to obtain an income tax advantage."
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> 107. However, in Mr Elliott's submission, regardless of where the legal burden of proof lay, HMRC had adduced sufficient documentary evidence to demonstrate that a main purpose or one of the main purposes of the Appellants being party to the transactions in securities was the obtaining of an income tax advantage with the result that the evidential burden of proof shifted to the Appellants. In any event, the evidential burden should lie upon the Appellants since the evidence of the Appellants' purposes was primarily within their control and knowledge. Mr Elliott noted that this Tribunal (Judge Poole), on 3 March 2020, had already made a determination under section 697 and decided that there was a prima facie case for HMRC to take further action on the basis that section 684 applied.
>
> 108. I did not understand Mr Foster, appearing for the Appellants, to dispute this analysis, but in any event I shall proceed on this basis as I see no sensible alternative."

86. Although *Wood v Holden* was cited as authority for its decision by the FTT in *RKBC*, it seems clear to us that there are (at least) two quite separate strands to the "shifting of the evidential burden". The first is the situation in *Wood v Holden* itself, where the person with the burden of proof has done enough to raise a case that they can say to the judge or tribunal, "What more can you expect from us? The burden must now pass to my opponent to produce some material to show that, despite what appears from everything which we have produced, the position is not what it so far appears to be."

87. Quite separate, it seems to us, is the situation where the burden of proof is on one party but the evidence is solely (or possibly primarily – see *Wroe* at [107]) in the hands of their opponent. This, of course, is the position that obtained in *RKBC*, *Wroe* and *Distinctive Care*. In all these cases the FTT accepted that, although one party (the appellant in *RKBC* and *Distinctive Care*, but HMRC in *Wroe*) had the legal burden of proof, the "evidential burden" was on the other. The shifting of the evidential burden in such cases would appear to be the result of an entirely separate approach by the courts. This is touched on by the FTT in *RKBC* at [53] when they observed:

> "53. Mr Vallat also took us to paragraph 772 of [Volume 11 of Halsbury's Laws of England, 5th edition (2009)] —
>
> > "Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter (*R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA), but there is no general rule of law to this effect (*R v Edwards*). There is authority contrary to this exception [citing inter alia *Doe d Bridger v Whitehead* (1838) 8 Ad & El 571], but it certainly exists and has frequently been applied by the courts.".
>
> In other words, said Mr Vallat, if you know, or have better access to, the position, you cannot sit on your hands."

88. *Edwards* is a criminal case. The appellant was convicted of selling intoxicating liquor without a licence. At trial, the prosecution proved that he had sold liquor but not that he did

not have a licence. The appellant appealed, arguing that the prosecution needed to prove that he did not have a licence. The Court of Appeal disagreed, holding that, where statute made an act an offence, save in specified circumstances or by persons of a specified class, the prosecution did not need to prove that the exception did not apply. In such cases, the legal burden of proof (emphatically not, the "evidential burden") rests on the defendant and this "does not depend on either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great treatise on evidence this concept of peculiar knowledge furnishes no working rule. If it did, defendants would have to prove lack of intent." (per Lawton LJ at p1095). Earlier (at p1091) Lawton LJ, commenting on a suggestion that there was "a general rule, that if a negative averment be made by any one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative", observed:

> "The qualification cannot apply to all negative averments. There is not, and never has been, a general rule of law that the mere fact that a matter lies peculiarly within the knowledge of the defendant is sufficient to cast the onus on him. If there was any such rule, anyone charged with doing an unlawful act with a specified intent would find himself having to prove his innocence because if there ever was a matter which could be said to be peculiarly within a person's knowledge it is the state of his own mind."

89. Beyond the submissions recorded above, we did not have the benefit of detailed argument on the extent to which the evidential burden can shift in cases where the party who does not have the burden of proof holds all the cards (or all the cards worth having) so far as the evidence is concerned. Certainly, the FTT seems to have accepted that this can occur, although neither *Wood v Holden* (which deals with a different aspect of evidential burden shifting) nor the primary authority cited in the edition of Halsbury discussed by the FTT in *RKBC* (*Edwards* – which appears to decide that the legal burden of proof shifted to the defendant because he was seeking to rely on a statutory exception and said in terms that this was nothing to do with the evidential burden) seem to provide much (if any) authority for, or guidance on, this aspect of evidential burden shifting. The current edition of Halsbury contains a statement (at paragraph 700 of Volume 11) to broadly the same effect as the passage cited in *RKBC*, although it would appear to be more nuanced and guarded. It reads as follows:

> "Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter, but there is no general rule of law to this effect. There is authority contrary to this exception, but it certainly exists and has frequently been applied by the courts. This is particularly the case in magistrates' courts and in criminal proceedings based on statute, and in some employers' liability situations. In civil cases the incidence of the burden of proof may be determined by agreement between the parties, so far as not prohibited by statute."

90. In this context, we remind ourselves of what seem to us to be some guiding principles:

(1) Because of the public interest in excise duties being collected and excise goods on which duty has not been paid not being in circulation in competition with goods on which duty has been paid, there is both strict liability for excise duty on a person holding the goods and an imperative to assess that duty. There is no room for discretion on HMRC's part or considerations of fairness and proportionality.

(2) There can be more than one duty point in respect of the same excise goods. In such a case, HMRC is required to "assess against the earliest point in time at which they are

able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement."

(3) To successfully challenge an assessment on the basis that there was an earlier excise duty point, a person found holding excise duty goods in respect of which duty has not been paid must prove a particular earlier duty point which HMRC can assess against. It is not enough to say (as is clearly the case here) that there must have been an earlier duty point. If that were sufficient, there would be a risk of an assessment against the person found holding the goods falling away without another assessment to take its place.

(4) The Tribunal has no inherent public law jurisdiction. We cannot compel HMRC to investigate whether an earlier duty point exists, nor (*Murphy* notwithstanding) is any failure to do so on HMRC's part (adequately or at all) a ground for discharging an assessment.

91. Because of the policy considerations discussed above, there can be absolutely no question of any shifting of the evidential burden to HMRC operating in a way which creates a risk of a person in Tideswell's position being able to challenge an assessment without it being shown that there is (not just that there might be) a particular earlier duty point against which HMRC can assess.

92. There can be no doubt that there was an earlier duty point in this case. Over 2.3 million Mayfair Blue cigarettes do not turn up as a job lot in the Black Country by magic. No one suggested that Tideswell manufactured them or transported them to Stoke-on-Trent. It is abundantly clear, however, that this is not sufficient. It is not sufficient for someone in physical possession of excise goods who was assessed for excise duty merely to point to the chain of supply and contend that there must have been an earlier release for consumption and a person in de facto or legal control of the goods before them and, accordingly, that they are not liable; *Dawsons* in the Court of Appeal at [76].

93. It seems to us that there are two, quite separate, questions here and we should analyse where the burden of proof (or evidential burden) lies separately.

Who bears the burden of proving that HMRC did not hold evidence to establish an earlier duty point?

94. The first question focuses on the evidential material HMRC hold. It is clear from *Davison & Robinson* (at [79]) that HMRC is required to *"*assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement." Before HMRC can assess Tideswell, therefore, it must be satisfied that it does not hold evidence which would enable it to establish an earlier duty point. If it does, it must assess against that duty point rather than Tideswell, even if Tideswell might be more likely to have the financial resources to meet the assessment. HMRC does not have to go looking for evidence, at least so far as this point is concerned, but it does need to form a view on the evidence it holds.

95. As a general rule, one might expect the burden of proof on this point (that HMRC does not hold evidence which would enable it to establish an earlier duty point) to lie on HMRC. By assessing Tideswell, HMRC is asserting that it is not in a position to assess against an earlier duty point and, as a general rule, the burden of proof lies upon the party who substantially asserts the affirmative of the issue; Phipson on Evidence (20th edition) paragraph 6-06. Put another way, HMRC not holding evidence sufficient to prove an earlier duty point is an essential part of HMRC's case, so the burden of proving that allegation rests on it. The difficulty with that position is that this appeal is brought under section 16 Finance Act 1994 ("FA 1994") and section 16(6) FA 1994 provides that "it shall [but for certain exceptions (none

of which are relevant here)] be for the appellant to show that the grounds on which any such appeal is brought have been established". In other words, if one of an appellant's grounds of appeal is that HMRC have evidence sufficient to establish an earlier duty point, the burden of proof is on the appellant to establish that HMRC has such evidence, not on HMRC to establish that it does not.

96. In *RKBC* and *Distinctive Care* the FTT held that there might be some shifting of the evidential burden to HMRC, or the burden of proof might sit with HMRC from the outset, because it was the only entity which had (or should have had) relevant evidence. There is an obvious parallel between this issue (What does HMRC know?) and the position in *Distinctive Care* (When did HMRC change its policy?). They are both questions only HMRC knows the answer to. Finding that there is a shifting of the evidential burden to HMRC on this point would not run counter to the policy issue (of not releasing one assessment without another duty point to take its place) identified as paramount in the cases, nor should it be difficult for HMRC to comply with. All they would be required to do is explain how they reached a conclusion (that they did not have material sufficient to establish an earlier duty point) they are required to have reached before assessing a person found holding excise goods on which duty should have been (but had not been) paid.

97. Despite all this and with some reluctance, we have concluded that there cannot be any shifting of the burden of proof or of the evidential burden to HMRC. This is because of the clear statutory provision in section 16(6) FA 19994, that it is for the appellant to show that its grounds of appeal have been established. Neither of the two FTT cases we have just referred to involved the FTT reaching a conclusion on where the evidential burden lay from the outset in the face of a clear, identified statutory provision laying the burden of proof on a particular party. As we have seen, even if the evidential burden (or the burden of proof) can in some circumstances attach itself from the outset to a party who holds all (or by far the better) cards, this is not an absolute rule and it must yield to the clear words of statute. The evidential burden might shift in the course of proceedings (in line with the approach in *Wood v Holden*), if an appellant can establish a prima facie case that HMRC held evidence sufficient to establish a particular earlier duty point, but the burden of establishing this ground of appeal (as with all its grounds of appeal) lies where the statute puts it, firmly on the appellant.

Who bears the burden of proving an earlier duty point?

98. The second (and quite separate) question is whether there actually is an earlier duty point, whether or not HMRC can work it out on the basis of the evidence they hold. It is clear on authority that the burden of proof here is on Tideswell. This is only to be expected; an appellant asserting that there is an earlier duty point would bear the burden of proving that for the reasons discussed in the preceding paragraph. The Upper Tribunal and the Court of Appeal have all considered where the burden of proof lies on the question of establishing an earlier duty point in circumstances such as this. It cannot have escaped their notice that HMRC might very well know far more about the chain of events that led to a person being found holding excise goods than that person, especially if they were an "innocent agent". We know (see [50] above) that this point was clearly in the minds of the Upper Tribunal in *B & M Retail*. This notwithstanding, there is no caveat in the various judgments and decisions as to where the burden of proof lies, nor is it qualified by reference to a (differently situated) evidential burden. Quite apart from the fact that requiring this would effectively be asking HMRC to prove a negative (that there is no earlier duty point), which (as the FTT noted in *RKBC*) is far from straightforward, and run counter to section 16(6) FA 1994, this would bring the policy risk of HMRC being left with no assessment back into play. Finally, as Mr Watkinson observed, whilst HMRC might be in a better position than an appellant when it comes to gathering evidence about where illicit goods have come from, this will by no means always be the case

and they will certainly not know enough to establish an earlier duty point. If they did, they should not have assessed the appellant in the first place.

99. We do not find anything in the three FTT cases we reviewed which addressed the evidential burden to disturb our conclusion. They addressed the location of the evidential burden in far simpler circumstances and without an equivalent to our overriding policy concern. In *Wroe* HMRC had already made out a prima facie case for what they accepted they were required to prove, so that case could be seen as an outworking of the *Wood v Holden* basis for evidential burden shifting. *RKBC* required HMRC to prove a positive (which claims had been waived) when they had (or should have had) all the evidence and *Distinctive Care* simply required HMRC to identify when their policy had changed, which should not have been difficult and which only they would know.

100. For all these reasons, we are satisfied that the burden of proof is on Tideswell to establish an earlier assessable duty point and there is no "shifting of the evidential burden" to HMRC.

An aside: protections available to appellants

101. We pause to observe that people in Tideswell's position are not without protection on these points. Firstly, as the Upper Tribunal observed in *B & M Retail*, judicial review may be available in appropriate cases in relation to any failure by HMRC to investigate whether any earlier assessable duty point exists.

102. Secondly, although this Tribunal has no supervisory role in relation to HMRC's investigations, it does have power under rule 5(3)(d) of the FTT Rules to make a direction to require a person to provide "documents, information or submissions", and under rule 16(1) to require a person to attend as a witness or to answer questions or produce documents. As Mr Watkinson fairly volunteered on behalf of HMRC, it is difficult to see circumstances in which a Tribunal would refuse an application for disclosure of evidence in HMRC's possession that might help to establish an earlier duty point where it was properly made. Where an appellant believes that, despite requests, HMRC has not disclosed such material, that would be an obvious application for an appellant to make.

103. Even when she and Mr Watkinson were asked for their written submissions on the shifting of the evidential burden and the safeguards offered by rules 5(3)(d) and 16(1) of the FTT Rules, Ms Choudhury did not ask the Tribunal to consider directing further disclosure from HMRC and deferring its decision until HMRC's responses could be considered.

Did HMRC hold evidence sufficient to establish an earlier duty point?

104. Turning to the question whether HMRC hold sufficient evidence to establish an earlier duty point, Ms Choudhury's complaint is that there is a significant period of time, from the date of the raid in May to the time when SP started his investigation, which is unaccounted for. She does not question CG's evidence that, as at the date of the raid, HMRC did not have sufficient evidence to establish an earlier duty point. Similarly, she does not question the evidence SP gave about the nature of his investigation. However, she says, we do not know anything at all about what (if anything) happened in the period between the winding down of Operation Margaret (in the middle of May) and SP starting his investigation based on the information sent to him. In particular, we do not know whether FIS carried out any further investigations or made any discoveries.

105. Ms Choudhury accepts that there is a presumption of legality here, that is to say that we should start with the assumption that HMRC, having raised an assessment on Tideswell, have done so lawfully. She does not submit that HMRC have deliberately acted outside the law, but simply that no one has looked at the entire chain of evidence in the round. She noted that HMRC were aware of Mr Woodcock's first visit to Tideswell's premises and she says that

leaves us with a "gaping hole" in the case. SP's investigations focused on Tideswell, and, she submits, we simply do not know what else there is to be found.

106. We agree with Ms Choudhury that HMRC's evidence could have been more completely and holistically presented. In particular, it would have been helpful if someone could have explained what (if anything) HMRC (FIS in particular) did in the gap period, and also if someone could have explicitly confirmed that they had looked at all of the evidence the different parts of HMRC held and had concluded that HMRC overall (not just any particular individual or operational group) did not have evidence in their possession sufficient to establish an earlier duty point. We paused in our deliberations on this point to consider whether we should, of our own motion, make an order requiring HMRC to produce evidence along these lines before making our decision, but we considered that it was unnecessary to do so as we had sufficient material to enable us to reach a conclusion on this issue.

107. We do not consider that there are "gaping holes" in HMRC's case. On the contrary, we are satisfied on the balance of probabilities, and find as a fact, that HMRC did not have in their possession evidence sufficient to enable them to establish an earlier duty point. We have reached this conclusion for the following reasons:

(1) SP's evidence is that, on the conclusion of their enquiries, FIS pass a case over to the group he works in with a view to them recovering excise duty. Given that purpose, it is difficult to see why FIS would pass on an incomplete case or not tell SP's group of anything relevant.

(2) CG's (unchallenged) evidence is that, at the time of the raid, he was privy to intelligence information, but "it did not permit HMRC to establish an assessable duty point, i.e. before [Tideswell] held the goods". CG can, of course, only speak to the intelligence he was privy to, but it was not suggested by Ms Choudhury that there was evidence he was unaware of, nor (given his role in intelligence development) is it easy to see why that would be the case.

(3) CG's evidence is that HMRC's enquiries focused on Mr Woodcock. He had been identified as distributing illicit cigarettes and HMRC were looking to uncover his sources of supply. If HMRC did not already know of Mr Woodcock's sources of supply, nothing they uncovered in their raid on Tideswell's premises would have helped them to do this. Mr Woodcock himself claimed to know nothing about the illicit cigarettes and provided no useful information. All the material SP followed up (the CMR and the false email address and phone number) led nowhere.

(4) It is possible (although we consider not very likely, given SP's experience with the "dead line") that, had HMRC interrogated JT's mobile phone, they may have discovered another mobile telephone number or other means of identifying someone who made contact with JT. That would not have established an earlier duty point, although it might have been a "lead" that led to one. That is irrelevant, however, as a failure by HMRC to make such investigations does not amount to the possession by them of any evidence relevant to this question.

108. We have not seen anything which suggests to us that HMRC were in possession of material which would enable them to identify an earlier duty point. They had focused their enquiries on Mr Woodcock and what they learned, as recorded in SP's letter to Mr Woodcock, clearly did not lead them anywhere. Again, whether HMRC could have discovered more from Mr Woodcock if they had tried harder is beside the point so far as this issue is concerned. The question we are focusing on is what HMRC could deduce from the material they had, not what they might have found out if they had pursued their enquiries in a different way. Unless FIS were pursuing an entirely different lead, which had produced useful evidence, entirely separate

from all the evidence produced to us and not included in the material given to SP to form the basis of his investigation, we cannot see how HMRC as an institution could be in possession of the evidence they would need to establish an earlier duty point. We should stress that Ms Choudhury did not suggest that FIS had conducted such an enquiry or found such evidence, and we have already concluded that, given the purpose of SP's group, it is difficult to see why FIS would pass an incomplete case over to them or not tell them of anything relevant.

109. We have held that it is for Tideswell to establish that HMRC held evidence sufficient to establish an earlier duty point. They have not done so. On the contrary, the evidence is such that, even if we are wrong and the burden were on HMRC to establish (on the balance of probabilities) that they did not hold sufficient evidence, we would have concluded that they had satisfied that burden.

Has an earlier duty point been established?

110. So far as the second question (whether there is an earlier duty point) is concerned, the burden of proof lies entirely on Tideswell to prove a particular earlier duty point which HMRC can assess against. Here, whilst there clearly must have been an earlier duty point, no evidence has been led that goes anywhere near establishing any of the four factors required to establish a particular earlier duty point, let alone all of them.

THE PENALTY APPEAL

111. The penalty was charged under Schedule 41 Finance Act 2008 ("Schedule 41"). Paragraph 4(1) of Schedule 41 provides:

> "A penalty is payable by a person (P) where—
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

112. Under the heading "degrees of culpability", paragraph 5(4) reads:

> "P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred…is –
>
> 'deliberate and concealed' if it is done deliberately and P makes arrangements to conceal it, and
>
> 'deliberate but not concealed' if it is done deliberately but P does not make arrangements to conceal it."

113. Paragraph 12 of Schedule 41 is headed "Reductions for disclosure" and sub-paragraph (1) provides that, in a case such as this, which relates to a "domestic matter", the possible reductions are set out at sub-paragraph (13). Paragraph 12(3) then reads:

> "Disclosure of a relevant act or failure
>
> (a) is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and
>
> (b) otherwise, is prompted."

114. Paragraph 13 of Schedule 41 then sets out the mitigation available for the "quality of the disclosure", namely for "telling, helping and giving" in the context of different types of penalty. The penalty was calculated on the basis that Tideswell's behaviour was deliberate, but not concealed, it involved a domestic matter and the disclosure was prompted. This resulted in a

penalty liability of between 35% and 70% of the potential lost revenue ("PLR"). HMRC considered the quality of disclosure and found that a reduction to 38.5% of the PLR was appropriate. The reduction comprised a 20% reduction for telling, a 30% reduction for giving and a 40% reduction for helping. Ms Choudhury did not challenge how HMRC had calculated the reduction, nor did she suggest that a further reduction should be made under paragraph 14 (special circumstances).

115. The meaning of "deliberate" in Schedule 41 was considered by this Tribunal in *Hare Wines Limited v HMRC*, [2023] UKFTT 25 (TC), where the Tribunal concluded (at [131]) that the interpretation of "deliberate" should reflect the decision of the Supreme Court in *HMRC v Tooth*, [2021] UKSC 17, in relation to the meaning of that expression in Schedule 24 to the Finance Act 2007, and accordingly "a person has acted "deliberately" if he intentionally acquires possession of goods knowing that the payment of duty is outstanding, and intentionally does not pay that duty." The test for "deliberate" behaviour is a subjective one, which requires proof that Tideswell actually knew that the goods were excise goods on which duty should have been (but had not been) paid.

116. It was common ground that the concept of knowledge/knowing in this context includes what is often referred to as "Nelsonian blindness". This was explored by the Upper Tribunal in *CPR Commercials Ltd v HMRC*, [2023] UKUT 61 (TCC) at [23]-[24]:

> "23. In our view, where a taxpayer suspects that a document contained an inaccuracy but deliberately and without good reason chooses not to confirm the true position before submitting the document to HMRC then the inaccuracy is deliberate on the part of the taxpayer. If it were otherwise then a person who believed there was a high probability that their return contained errors but chose not to investigate would never be subject to a deliberate penalty. However, the suspicion must be more than merely fanciful. Lord Scott of Foscote urged caution in this context in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1 at [116]:
>
> > "In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."
>
> 24. Although the concepts of blind-eye knowledge and recklessness as to the truth or falsity of a statement may intersect, they are clearly not identical. As we have already stated, HMRC did not ask us to consider whether an inaccuracy is deliberate where a taxpayer is reckless as to whether the document contains any errors. In the absence of any argument on the point from HMRC, and because it is not necessary for the purposes of this decision, we do not consider whether recklessness is a sufficient basis for determining that an inaccuracy is deliberate further in this decision, and make no comment either way."

117. Both Mr Watkinson and Ms Choudhury accept that "Nelsonian blindness" is also subjective, in that it requires a deliberate, conscious decision not to investigate whether a

situation an individual has good reason to believe in is in fact the case. Not appreciating, and thus not investigating, a risk (however obvious it might appear to others) is not enough.

118. As far as Tideswell's behaviour is concerned, Mr Watkinson started by asking why those looking to store the illicit cigarettes (the "crooks" as he referred to them, and we will do the same) chose to store their cigarettes in Tideswell's premises. It was certainly not geographical convenience. Mr Woodcock was distributing from his base in South Yorkshire, and Tideswell's premises are not convenient for that. The cigarettes were worth over £1m and the crooks would be running a big risk if they located the cigarettes with someone who either did not know what was going on and was happy to be involved or who could be relied on not to ask any questions, however red the flags are that are fluttering and however many there are. There was no other reason to choose Tideswell.

119. Looking at the particular features of the case, he noted that we have someone called "John" turning up. He does not give his name and no one asks him for it. Then Tideswell get an email from someone else (Peter McGrath) at a company they had never heard of before. No address is ever provided by the company. They agree to pay over the odds to store a number of boxes. Then there is a bank deposit simply labelled "John". There is no indication of how the payment was made; it could simply have been a cash payment over the counter in the bank. Then we have the delivery by a lorry which hands over a CMR which is obviously nonsensical. Then someone else turns up to collect the goods and that person's identity was never disclosed to Tideswell before he came.

120. In Mr Watkinson's submission, this amounts at the very least to a deliberate failure to enquire. Any reasonable business would look at all these factors and ask what on earth was going on. There are inconsistencies in JT's account of events. He said that he had not been arrested, but he had been. In his interview he said that he looked at the documents closely, but now he says that he just checked how many pallets there were. Again, in his interview he said that the CMR referred to "office furniture", which it clearly does not. He said he was not interested in what people were storing, but all the agreements he uses for his tenants say something about use. He went around the houses on whether Tideswell operates a storage or rental business. In an email to SP he said that the "company just operates on – site storage and rental units". Now he has changed his tune to say that the company's business is a rental one. There has been inconsistency about whether someone came with John to the first meeting.

121. Then we have significant differences between how Tideswell deal with their tenants normally and what they did here. JT loaded and unloaded goods for a client who never came to meet the lorry. He was very involved in looking after the goods, their custodian far more than a landlord. There is no formal document governing the relationship. Finally, we have the email JT sent to Peter after he had been released from the police station. McGrath Office Supplies were not provided with access to the site and JT kept the keys and had to make himself available for deliveries and collections.

122. In response to all of this, Ms Choudhury says that Tideswell was only being paid a relatively small amount of money (£600 per month) for the Unit and the risk it was running (potentially losing its business if it did something seriously wrong, such as storing large amounts of illicit cigarettes) was out of all proportion to the potential reward. Why on earth would someone in JT's position, and especially at his age, do this? As far as the informality of the arrangements are concerned, she simply says that JT never bothered to ask John his surname, because he had no need to. He made an offer to John on a "take it or leave it" basis and no doubt John would be in touch if he wanted to take it up. It is, she submits, easy to build up a picture in hindsight, but as far as JT was concerned, he was simply developing a relatively

low-level relationship with a new customer, who wanted some modest facilities and, it was hoped, would end up taking a longer lease, which would be appropriately documented.

123. If JT did have knowledge of what was proposed, then he went about facilitating the crooks in a rather odd way, using his own unit, helping to load and unload goods, going to the police station with the HMRC officers, answering all of their questions and not insisting on legal representation. Someone who was knowingly involved with illicit cigarettes would have realised the risk they were running and taken steps to try to limit that exposure.

124. As far as the email following his release from the police station is concerned, it was clear that JT had not realised he had been arrested or the danger he was in. Until this hearing he was convinced that he had gone to the police station voluntarily. There was no suggestion at any point during his interview that, although the illicit cigarettes had been seized, there was an additional duty liability which might fall on Tideswell. That only became apparent in the correspondence with SP which started several months later. There was no particular reason for JT to be alarmed; as he told the HMRC officers, this was the first he had heard about illicit cigarettes, and he was sure he had done nothing wrong.

125. JT gave evidence before us and the impression we formed of him is of a straightforward, albeit unsophisticated and naïve individual. We found it difficult to conceive of him storing these cigarettes knowing that they were subject to excise duty which had not been paid. We agree with Ms Choudhury that there is simply no evidence to suggest that this is the case. Whilst his arrangements with McGrath Office Supplies might be relatively informal, he had an explanation for that. He thought he knew who he was dealing with and that the necessary details about the business would be forthcoming in due course. The level of risk he was running (if he did know what he was letting himself in for) is out of all proportion to the reward he was receiving. Mr Watkinson did not suggest that Tideswell was receiving further rewards from the crooks beyond the £600 a month rental fee and we simply do not accept that someone in JT's position would consciously allow Tideswell to run the risk of storing illicit goods for such a low return.

126. So far as "Nelsonian blindness" is concerned, again JT's explanation (that it never occurred to him that there was anything here that needed investigation and which he deliberately closed his mind to) is consistent with the impression we formed of him. There was nothing unusual about not having a formal lease (particularly in a situation such as this where the unit was being shared with Tideswell), nor with a tenant paying for more space than they absolutely need. The bank statement simply refers to a "credit" and does not say whether the payment was a transfer or an over-the-counter cash deposit. There is nothing remarkable in a bank transfer which reflects an email which had announced it. Although JT was previously in the haulage business, Tideswell's business does not require CMRs. He has some familiarity with them, but we accept that he simply looked to see whether the consignment was of the 12 pallets he was expecting. It is unreasonable to expect JT to have scrutinised the CMR and formed the view on its plausibility which SP and Mr Watkinson have done at some leisure after the event. He would have given McGrath a key to access the site if they had asked for it and loading and unloading was something he did for other tenants.

127. In short, Ms Choudhury submits, there is nothing in the relationship between Tideswell and the crooks which on its face would suggest that there was a high risk of Tideswell being asked to store illicit goods. With the benefit of hindsight one can see that some of these features might have elicited a vague sense of unease, but there are no specific facts which would firmly ground a suspicion. JT/Tideswell were simply entering into a relatively informal, low-key relationship in the hope that it would lead to something more substantial.

128. We agree with Ms Choudhury that, whilst there may be features of the relationship between Tideswell and the crooks which with the benefit of hindsight might create a sense of unease, none of the factors to which Mr Watkinson has pointed of themselves suggest either that JT knew what he was doing or which so obviously pointed towards what was going on that he must have at the very least turned a deliberate blind eye to the risk. When we add that to our perception of JT from seeing him give evidence, that he is a straightforward, albeit relatively naïve, unsophisticated and quite elderly individual, we accept JT's evidence that it simply never occurred to him what was going on. We accept that it never occurred to JT that his relationship with McGrath Office Supplies was anything other than a relatively informal, early-stage business arrangement. Tideswell had not been "in trouble with the authorities" before. Not appreciating that risk, as opposed to knowing about it or appreciating the risk and deliberately ignoring it, is not sufficient to amount to "deliberate" behaviour for this purpose.

129. If Tideswell's behaviour was not deliberate, HMRC could still impose a penalty, albeit of a lower amount, 30% of PLR. That is subject to the same reductions for disclosure, subject to a minimum penalty of 10% of PLR, on the basis that HMRC become aware of the failure less than 12 months after the time when the tax first became unpaid by reason of the failure (which we take to be a reference to when Tideswell first held the illicit cigarettes – 21 March 2019). Applying the same reduction here would give a penalty of 12% of PLR.

130. On the Penalty Appeal, we can substitute for HMRC's decision another decision HMRC had power to make; see paragraphs 17 and 19 of Schedule 41. Accordingly, we propose to discharge the penalties based on deliberate behaviour and substitute penalties under paragraph 6(2)(c) with the same level of reduction as previously applied by HMRC. We have calculated the penalties as being 12% of PLR. If either party considers our calculation to be wrong, we will reconsider it.

131. Ms Choudhury did not suggest that there were special circumstances that would justify a further reduction under paragraph 14 and we cannot see any such circumstances for ourselves. Whilst we have found that JT's actions were not deliberate, Ms Choudhury herself accepted that, at least with the benefit of hindsight, there were factors that might create a sense of unease and in his evidence to us JT said that he was now more interested in what his tenants stored than he had been in the past. Whilst not deliberate, we consider that JT was (objectively) careless in his behaviour and accordingly some penalty is appropriate.

DISPOSITION

132. For the reasons set out above:

(1) the Liability Appeal is dismissed;

(2) the Penalty Appeal is allowed and both penalties are reduced to 12% of PLR.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

133. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 16th JANUARY 2024