Neutral Citation: [2024] UKFTT 00369 (TC)

Case Number: TC09158

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2015/04696

EXCISE DUTY – goods held outside a duty suspension arrangement - – no evidence that duty paid – excise duty point – whether the Appellant held, handled or had any involvement in the goods – Dawson's (Wales) Ltd, Davison & Robinson and Perfect considered and applied - whether the assessment was in time – Lithuanian Beer Ltd & Pegasus Birds Ltd considered and applied - importance of the word 'knowledge' – absence of doctrine of collective knowledge - Carltona principle and implied delegation – whether duty could be calculated on the available evidence - Schedule 41 excise wrongdoing penalty – prompted & non-deliberate behaviour –whether liability to a penalty depends upon liability to the assessment – whether 'knowledge' or 'means of knowledge' is relevant to liability – whether the penalty was in time – Appeal dismissed

Heard on: 30 January 2024
Judgment date: 2 May 2024

Before

JUDGE NATSAI MANYARARA
MICHAEL BELL

Between

FREEDOM RECYLCING LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Paul Boyle, Director

For the Respondents: Mr Joshua Carey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant appeals against an excise duty assessment ('the Assessment") in the sum of £46,749, raised pursuant to s 12(1A) and s 12(4) of the Finance Act 1994 ('FA 94'), dated 11 March 2015 (and notified on 16 March 2015). The Assessment was raised after HMRC found evidence demonstrating that two consignments of alcohol ("the Goods") had been collected from the Appellant's premises on 3 August 2012 and 15 August 2012. HMRC concluded that the Goods were held outside a duty suspension arrangement by the Appellant in circumstances where excise duty had not been paid, relieved, remitted or deferred.

2. The Appellant further appeals against an excise wrongdoing penalty ("the Penalty") issued on 23 February 2016, in the sum of £14,024.70 (reduced from £32,724.30). The Penalty was issued pursuant to para. 4(1) and para. 16(1) of Schedule 41 to the Finance Act 2008 ('Schedule 41') on the basis of non-deliberate, non-concealed and prompted behaviour - reduced from a range of 35% to 70% of the Potential Lost Revenue ('PLR') to 20% to 30% of the PLR.

3. The documents to which we were referred included the: (i) Hearing Bundle consisting of 804 pages; (ii) Legislation & Authorities Bundle consisting of 604 pages; (iii) Appellant's Legislation & Authorities Bundle consisting of 16 pages; (iv) amended and consolidated Statement of Case dated 16 August 2023; (v) HMRC's Skeleton Argument dated 9 January 2024; (vi) Appellant's Skeleton Argument; and (vii) HMRC's application to admit late evidence, dated 26 January 2024.

THE ISSUES

4. The issues raised in this appeal are:

   (1) Whether the Assessment and Penalty were issued in time;

   (2) Whether the Appellant held, handled or had any involvement in the Goods; and

   (3) Whether the Penalty has been correctly applied.

BURDEN AND STANDARD OF PROOF

5. HMRC have the burden of proving that they have issued a valid Assessment and that the Penalty has properly been applied.

6. The burden of proof is on the Appellant to show that: (i) the Assessment was not in time; and (ii) there is no liability to excise duty.

7. The standard of proof is the civil standard; that of a balance of probabilities.

BACKGROUND FACTS

8. The Appellant was incorporated on 19 October 2005 and its directors are Paul Boyle, Pamela Cobbold and Nicola Cobbold.

9. The Appellant's business activity is "the treatment and disposal of non-hazardous waste" through the collection/receiving of waste from a variety of commercial and domestic clients. The Appellant collects baled waste material and receives material delivered to its site waste from a wide variety of commercial and domestic sources, including local authorities, builders, the United States Air Force bases and domestic clients. The appellant sorts and separates the received material, recycling 85% with the remainder going to refuse derived fuel for electricity production.

10. On 5 December 2012, Officers Flatman (leading), Crotch, Wright, Prescott and Hansler, of the Fraud Investigation Service ('FIS'), visited the Appellant's premises ('Freedom Farm') ("the first visit"). Officer Flatman explained that the reason for the visit

was to inspect the premises and ascertain if there were any alcohol products liable to excise duty on site. He also explained the legal power under which the inspection was taking place. Mr Boyle stated that some goods had been destroyed on the site about three years prior to the first visit. These were goods that were destined for use by United States Air Force personnel on the RAF bases they occupy. The goods under this regime would have been free of UK taxes.

11. No revenue goods were found on the Appellant's premises and no further contact was made with the Appellant until 2014. Following further investigations, HMRC made enquiries with various hauliers.

The third parties/hauliers

12. On 3 August 2012, a load of alcohol was said to have been collected from the Appellant's premises by R.G. Bassett & Sons Ltd ("Bassett & Sons") and delivered to Ascos Cash & Carry Ltd (t/a Shiraz Cash & Carry) ("Ascos"), as set out in a consignment note.

13. On 13 August 2012 Abbey Logistics Group Ltd ("Abbey Logistics") stated that they had received instructions from CJM Logistics Ltd ("CJM") to collect a load of alcohol from the Appellant's premises. The driver at the time was advised that the load was not on site and he was later advised that the load was at a different location in Peterborough.

14. During these supply chain checks, it was discovered that CJM were supplying haulage services to Ascos. Paperwork uplifted from CJM showed that the work was subcontracted to several companies. Included were invoices relating to the collections on 3 August 2012, 13 August 2012 and 15 August 2012.

15. On 15 August 2012, Custom Haulage Ltd ("Custom Haulage") stated that they had collected a load of alcohol from the Appellant's premises, as set out in a consignment note. On 6 February 2013, Officer Idowu issued a referral form, requesting a visit to Custom Haulage to attain information on the 15 August 2012 collection. Custom Haulage provided tracking information for their vehicle. This information was reported back to Officer Idowu in a visit report, dated 12 March 2013.

16. On 28 February 2013, HMRC (Officer Horsfield) visited Custom Haulage and spoke to Scott Hepworth. Mr Hepworth explained that he had received instructions from an individual known only as Mike, from CJM, but that he did not know that alcohol was being collected until his driver arrived at the collection address and collected, and delivered, 26 pallets of mixed beer. Pursuant to company policy, the driver was required to complete a delivery sheet as no delivery paperwork was said to have been provided to the driver. The delivery sheet showed that alcohol had been collected from the Appellant's premises and delivered to Expo Cash & Carry Ltd ("Expo"). Mr Hepworth confirmed that the invoice for the transportation was paid in November 2012.

17. On 27 September 2013 Officer Idowu raised a referral for the Appellant to gather information for the case on Ascos, requesting details be gathered on the collections from the Appellant's site.

18. On 22 January 2014, Officer Idowu visited Abbey Logistics, in relation to the collection on 13 August 2012, and spoke to Stephen Farrell (Director). Mr Farrell explained that as a haulier, they would collect goods and move them. He added that sometimes paperwork was provided, but sometimes it was not. Following this meeting, Stewart Allerton provided a witness statement, signed 22 August 2014, stating that he had been asked to collect a load from the Appellant. On arrival, he was told that the load should be picked up from an alternative location in Peterborough. The load turned out to be alcohol.

19. On 2 May 2014, HMRC visited Bassett & Sons where they spoke to Mr Wayne Bentley. Mr Bentley noted that on 3 August 2012, he was instructed to collect an unidentified load from the Appellant. He explained that he had to wait until a vehicle bearing Irish number plates arrived and a load was transferred to his vehicle (a mixture of beers and wines), but that no consignment note was provided to him. On the same date, HMRC issued a notice of assessment to Fios Cash & Carry Ltd ("Fios") in respect of purchases and sales of alcohol made by Ascos between April and November 2012. This is because supply chain checks made by HMRC into the alcohol purchased by Ascos and Fios were unable to find evidence of duty payment, resulting in assessments for unpaid excise duty to Fios for £1,584,973, and to Ascos for £449,510.

The second visit

20. On 7 March 2014, Officer Idowu ("the assessing officer") wrote to Mr Boyle (by email) advising that HMRC intended to visit the premises in relation to the movement of alcohol on behalf of CJM. The email stated that his enquiries, thus far, had shown that an offence may have been committed, and included a draft duty calculation relating to the Goods collected on 3 August 2012 and 15 August 2012.

21. On 21 March 2014, Officer Idowu visited the Appellant's premises ("the Visit") and spoke to Mr Boyle to discuss the movement of alcohol from the Appellant's premises on three separate occasions. The Visit was in the exercise of HMRC's statutory powers pursuant to s 118 of the Customs & Excise Management Act 1979 ('CEMA'). Officer Idowu showed Mr Boyle three invoices from the third parties/hauliers, each of which showed that two loads of alcohol had been collected from the Appellant's premises in August 2012. Mr Boyle stated that no alcohol had ever been received at the site, and that the only commodity dealt with by the Appellant was waste. Officer Idowu was unaware of the first visit in 2012 and failed in his attempts to find information about the first visit when he was informed of it.

The Assessment

22. On 16 March 2015, Officer Idowu wrote to the Appellant stating that they had been unable to obtain sufficient evidence to trace the provenance of the Goods and verify that duty had been paid. The letter explained that goods held outside a duty suspension arrangement where excise duty had not been paid, relieved, remitted or deferred were considered to be released for consumption, and that the person holding the goods was liable to pay the duty evaded. Officer Idowu therefore raised the Assessment. On 14 April 2015, Officer Idowu wrote to the Appellant stating that records showed that the Appellant owed £46,749.

23. On 16 April 2015, the Appellant's representative, Altion Law ("Altion") wrote to HMRC stating that the Appellant was a recycling company and did not hold goods of the nature which were the subject of the Assessment.

24. On 9 June 2015, following further exchanges of correspondence, Altion wrote to HMRC requesting a review of the decision. The review conclusion was reached on 9 July 2015, upholding the Assessment.

25. On 7 August 2015, the Appellant lodged an appeal against the Assessment with the First-tier Tribunal ('FtT').

The Penalty

26. On 12 January 2016, HMRC issued a penalty explanation letter. This was followed by a Penalty on 23 February 2016.

27. Following a request for review on 2 March 2016, HMRC issued a review conclusion on 4 May 2016.

28. On 23 May 2016, the Appellant appealed against the Penalty.

APPEAL HEARING

Preliminary discussions

29. At the commencement of the appeal hearing, we heard HMRC's application to admit late evidence, which comprised of further evidence of the employment status of Stewart Allerton and Dean West, both of whom were said to have worked for the third-party hauliers/drivers ("the late evidence"). HMRC had previously obtained witness statements from Wayne Bentley.

30. Mr Boyle indicated that he did not object to the admission of the late evidence. As Mr Boyle is a litigant-in-person, we considered: (i) whether the evidence was relevant to the appeal; (ii) whether there was any prejudice to the Appellant if the evidence was admitted; and (iii) whether there was any prejudice to HMRC if the evidence was not admitted. Having considered the issues in the appeal, we were satisfied that the new evidence was relevant to the appeal and did not introduce any new issues, but was intended to corroborate the evidence previously disclosed and relied on by HMRC (as notified to the Tribunal and the Appellant). We, therefore, admitted the late evidence; the presumption being that all relevant evidence should be admitted unless there is a compelling reason to the contrary: *Atlantic Electronics Ltd v R & C Comrs* [2013] EWCA Civ 651, at [31].

31. Mr Carey submitted that he was not intending to call Officer Davie and indicated that this had been dealt with by way of consent following discussions with Mr Boyle where Mr Boyle was said to have indicated that he did not wish to ask Officer Davie any questions on the basis that Officer Idowu ("the assessing officer") had retired and Officer Davie did not appear, in his opinion, to add anything to the case. We explored Mr Boyle's understanding of the significance of not being in a position to test any live evidence, in relation to any submissions that he later wished to make. Mr Boyle subsequently indicated that he did wish to cross-examine Officer Davie after all.

Opening Submissions

32. In his opening submissions, Mr Carey submitted that:

(1) The Assessment relates to Goods collected from the Appellant's premises on 3 August 2012 and 15 August 2012. Following the first visit on 5 December 2012 by the FIS, an investigation ensued and an illicit supply chain was revealed, where various third-party hauliers were interviewed. Further work was, however, required to be done before the Assessment was raised.

(2) In relation to whether the Assessment was made in time, the clock started ticking when the Visit took place in 2014, and the results of HMRC's investigation were given to Mr Boyle.

(3) HMRC are satisfied that three separate arm's length entities have identified the Appellant's premises as being where the duty point arose as the Goods were collected from the Appellant's premises.

(4) There are separate legislative provisions in relation to the Assessment and the Penalty. The Appellant's position is misconceived in relation to liability to either, or both.

Third-Party Witness Statements

33. There were witness statements (included in the Hearing Bundle) from Stewart Allerton - of Abbey Logistics; Dean West - of Custom Haulage; and Wayne Bentley - of Bassett &

Sons. On 2 October 2023, HMRC's application to rely on the third-party hearsay evidence was granted by the Tribunal.

34. On 20 May 2014, Mr Bentley gave a witness statement to HMRC stating that on 3 August 2012, he was instructed to pick up an unknown load from the Appellant's premises. He explained that he had arrived at the site at approximately 12:45 and had to wait for approximately an hour for the load to arrive. When it did arrive, the vehicle bore an Irish number plate and the driver stated he had come from "the Continent" via Dover. The goods were moved from the Irish vehicle to the Bassett & Sons vehicle by forklift and consisted of mixed beers and wines in, generally, poor condition. He added that he was not given any paperwork for the goods. He left the Appellant's premises at approximately 14:10 and delivered the goods to Bassett & Son's depot. He believed the goods were delivered to Liverpool the next day by another driver.

35. On 29 July 2014, Mr West gave a witness statement to HMRC regarding the collection of alcohol from the Appellant's premises on 14 August 2012. He stated that he collected 26 pallets of beer from the Appellant, which he then delivered to Expo in Doncaster.

36. On 22 August 2014, Stewart Allerton gave a witness statement to HMRC. Mr. Allerton was employed as a driver for Abbey Logistics. He stated he was instructed to pick up a load from the Appellant's premises on 13 August 2012. On arrival, he was informed the load was not at the Appellant's premises. He was then instructed to collect the load from Fios in Peterborough. The load picked up was 'mixed alcohol', which was then delivered to Ascos in Liverpool.

37. The witness statements of both Dean West and Stewart Allerton make reference to access to the Appellant's site as being by dirt road.

38. HMRC did not propose to call any live evidence from either of those individuals, as they were said to no longer work for the third-party hauliers and could not be contacted.

Oral Evidence

39. We heard oral evidence from Officer Davie. Officer Davie is a Higher Officer of HMRC. His duties include assurance and compliance work in the area of alcohol duties. Officer Davie was not involved in the Assessment, but has familiarised himself with the case in light of the retirement of the assessing officer (Officer Idowu), and has adopted the decision. In his oral evidence, Officer Davie adopted the contents of his witness statements, dated 14 July 2017, 4 October 2023 and 26 January 2024, as being true and accurate. He was not asked any further questions in examination-in-chief by Mr Carey.

40. Under cross-examination by Mr Boyle, Officer Davie stated that the first visit in 2012 by the FIS was by a different unit within HMRC, and that the assessing officer had not been involved in that investigation. Therefore, no assessment could have been raised at that point. The remainder of Mr Boyle's cross-examination of Officer Davie can, more adequately, be described as statements that were more suited to his submissions. In this respect, Mr Boyle submitted that the third-party statements (from witnesses not called to give evidence) all appeared to be identical and did not describe the actual layout of the Appellant's premises. He added that there were two other tenants on the Appellant's premises/site and that the officers who visited did not speak to those tenants. Officer Davie stated that if he had conducted the Visit, he would have spoken to those tenants.

41. We then heard from Mr Boyle. Mr Boyle adopted the contents of his witness statement, dated 14 July 2017, as being true and accurate. In his witness statement, he described the Appellant's business activity. He further explained that all commercial vehicles are weighed in and logged at the Appellant's site, with copy records kept on the premises to comply with

the Appellant's EA permit (as well as the records of the weight, logs, vehicle registrations, details of the company name and of who owns the vehicle entering the Appellant's site and details of the goods type being delivered or collected).

42. Mr Boyle added that Freedom Farm (the Appellant's premises/site) is a secure location with only one way in and only one way out. All vehicles and personnel can only enter the site by crossing a bridge over a waterway, and then by entering a gate which is closed and locked each night to secure the site. He identified photographs of the site showing the entrance to the premises. He explained that once a vehicle goes through the Appellant's weigh-in, the details of that vehicle have to be recorded. He further referred to photographs of the weigh - in area on site.

43. Mr Boyle emphasised that the recycling industry is a regulated industry, which requires all vehicles entering the site to be weighed, and for those records to be kept in accordance with the Appellant's EA permit. He reiterated that the Appellant does not deal in alcoholic beverages, at all, and never has. He stated that he was surprised to hear what he had been told by the assessing officer during the Visit as HMRC had said that a mistake had been made after the first visit, and he thought that that would be the end of the matter. He further stated that he had never heard of any of the third-party hauliers whose statements were being relied on as the basis of HMRC's investigation and Assessment. In his witness statement, Mr Boyle referred to deficiencies that he had identified in the documentation relied on and referred to by HMRC (in respect of the third-party hauliers).

44. Mr Boyle's written evidence was also that the assessing officer never asked to look around the site when the Visit took place in 2014. He added that the officer(s) who had attended on that occasion went straight to his office, and would not have been able to see the full extent of the site as all one can see out of the office windows are the front of other buildings. He further added that the officers asked him if he had heard about the third-party entities, and also asked about vehicles coming in and out of the premises in August 2012. He stated that he had advised them that the Appellant keep records and then showed them records of the vehicles entering, and leaving, the site on the relevant days.

45. Under cross examination by Mr Carey, Mr Boyle repeated that all vehicles are logged on arrival at the Appellant's site, which has a moat at the entrance. He once again referred to that the weighbridge to the right of the entrance, and stated that lorries are ordinarily weighed by staff. He further added that staff then input the information into a record book and a handwritten weighbridge ticket is issued (which acts as a log for the Appellant's records), but stated that there is no automated system in place. He confirmed that he was not responsible for managing the gate and accepted that he would have no way of knowing if staff at the gate were accurately recording information, or knowledge of whether the possible delivery of alcohol would have been recorded.

46. Mr Boyle accepted that there was nothing in the notes to the first visit in 2012 that indicated that HMRC accepted having made a mistake in respect of whether the Appellant had any involvement in excise goods. He also accepted that HMRC were still conducting an investigation when the Visit in 2014 took place. He could not, however, recall whether the consignment notes were discussed at that time, or whether he was handed any information about his rights. His position was that there as an inaccuracy in HMRC's investigation and that the Assessment could have been raised prior to 2014.

47. Mr Carey then took Mr Boyle to the invoices obtained from the third-party hauliers and Mr Boyle accepted that, on the face of the documents, they showed the collection address for the Goods as being the Appellant's address. He added, however, that the Appellant was a 90% tenant as there were two other tenants on site. He nevertheless stated that he did not

speak to the other tenants to establish any anomalies in respect of their activities as that would have been a difficult conversation to have.

48. In respect of the Penalty, Mr Boyle disagreed that the Penalty had been correctly applied, but accepted that the criticisms he had made in respect of the Penalty was in relation to his opinion about the paperwork.

49. In response to questions for the purposes of clarification from the panel, Mr Boyle stated that he spends 90% of his time in his office (on the premises), and could only see the entrance to the premises when he looked out of the window as his desk faced away from that window. He added that another reason why he did not make his own enquiries with the tenants was that HMRC had walked around the premises in high visibility vests during the visit(s). He further added that there were 13 to 14 members of staff on the Appellant's site.

Closing Submissions

50. In respect of whether the Assessment and the Penalty were in time, Mr Carey submits that:

(1) The Assessment was raised on 15 March 2015, within one year of the evidence sufficient in the assessing officer's opinion to justify making the Assessment. It is the evidence which justified the Assessment which was, in fact, made, and not the hypothetical assessment that might have been made, which is significant: *DCM (Optical Holdings) Ltd v R & C Comrs* [2022] 1 WLR 4815 ('*DCM*'). More investigative work was required to be undertaken before an assessment could be raised because of the requirement that HMRC assess the first duty point: *Davison & Robinson Ltd v R & C Comrs* [2018] UKUT 437 (TCC) ('*Davison & Robinson*'). When the first visit took place in 2012, HMRC had done little more than try to identify matters relevant to the Assessment, without yet having sufficient evidence to actually make an assessment:

(2) The witness statements provided by the drivers who collected the Goods from the Appellant's premises provided sufficient evidence such that HMRC could proceed to make the Assessment when they did. That was not until after Officer Idowu had visited the Appellant's premises in 2014 (i.e., the Visit), at which time Mr Boyle's denial that alcohol had been collected was considered to be at odds with the supply chain enquiries that had been carried out. The inconsistency provided sufficient evidence to justify making the Assessment: *Rasul v HMRC* [2017] STC 2261; [2017] UKUT 357 (TCC) ('*Rasul*'). "Reasonableness" must be assessed against the very significant complexity around tracing supply chains where fraud is inherent in the movement.

(3) Even if HMRC are wrong about the preceding arguments, the Assessment is still valid and in time. This is because the first visit in 2012 was conducted by the FIS. The assessing officer was working in a different team at the time and he did not obtain all of the relevant information until 21 March 2014. There is no doctrine of "collective knowledge" and the fact that information may have been held by other officers at another time is not relevant: *R & C Comrs v Tooth* [2021] UKSC 17 ('*Tooth*'), at [68] to [70] (albeit in a different context). Time does not begin to run until the information was made known to the assessing officer.

(4) Even if the FtT finds that the Assessment is time-barred, that does not have the effect of vitiating the Penalty as there is liability to excise duty as a matter of fact. This is because liability to a penalty does not depend upon the Appellant's liability to the Assessment. The Appellant's position is predicated on a misunderstanding of when the penalty assessment time-limit starts.

(5) The time-limit in para. 16(4) of Schedule 41 operates from the time that the Assessment has been determined. The Assessment has not been determined because it is subject to an appeal. Therefore, the Penalty issued on 23 February 2016 is in time.

(6) HMRC ascertained the amount of tax unpaid by reason of the relevant act or failure on 16 March 2015 (pursuant to para. 16(4)(b) of Schedule 41) and the Penalty on 23 February 2016 is within the time-limit of one year: *Euro Wines (C &C) Ltd v R & C Comrs* [2018] EWCA Civ 46 ('*Euro Wines*'), at [3].

51. In respect of whether the Appellant had any involvement in the Goods, Mr Carey submits that:

(1) The Appellant is liable to the Assessment because it held the Goods within the meaning of reg. 6(1)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the Excise Goods Regulations"): *Dawson's (Wales) Ltd v R & C Comrs* [2023] 4 WLR 35 ('*Dawson's*'), at [76]. The word "held" must be given an ordinary and natural meaning, with an eye to preventing fraud. It does not require one to have been "caught red-handed". The Appellant is liable for the unpaid excise duty because it held the alcohol which was, in fact, collected from its premises: *R & C Comrs v Perfect* [2022] EWCA Civ 330 ('*Perfect*'), at [22]. "Knowledge", or "means of knowledge", is irrelevant to whether an individual is liable or not.

(2) It is clear that someone at the Appellant's premises was exercising a degree of control over the collection and movement of the Goods: *R & C Comrs v WR* Case C-279/19 ('*WR*'), at [24], [27] – [29]. The Appellant was also able to control access to its premises, where collection took place: *Van De Water v Staatssecretaris van Fianciën* [2001] All ER (D) 53 and *Hughes v HMRC* [2022] UKFTT 00400 (TC). The purpose of the Excise Directive is to cast a wide net.

(3) There is no requirement for HMRC to have precise details of the loads that have been assessed. All that is required is that HMRC make an assessment to the best of their ability (similar to a best judgment assessment). HMRC regularly make assessments to their best judgment based on the information known to them: *Van Boeckel v C & E Comrs* [1981] STC 290 ('*Van Boeckel*'), at 292 to 203 (Woolf J); and *Pegasus Birds* [2004] STC 1509 ('*Pegasus Birds*'). 'Best judgment' only arises as an issue if the Assessment was made randomly, arbitrarily, capriciously, maliciously, etc.: *Rahman (t/a Khayan Restaurant) v C & E Comrs (No. 1)* [1998] SCT 826 (Carnwath J).

(4) HMRC's calculations were predicated on a sound and reasonable basis; namely, standard loads of an average quantity and strength of beer. This has resulted in a more favourable calculation for the Appellant given that wine, attracting a higher duty rate, was included in the loads. It is appropriate to draw inferences from the available evidence in order for the liability to be ascertained: *Thomas Corneill v HMRC* [2007] EWHC 715 (Ch) ('*Corneill*'), at [32] to [33] (Mr Justice Mann) (in respect of a similar provision). An error in the calculation of an assessment does not call into question the officer's judgment. There is a distinction between the best judgment issue and the quantum issue. An assessment based on a flawed calculation is still capable of being held to have been made to the best of the officer's judgment. The bar for an assessment to fall on the grounds of not being to best judgment is a high one to overcome. The best evidence available is from the hauliers who noted the collection address as being the Appellant's premises.

(5) HMRC have expressly taken into account the handwritten logs that the Appellant has provided. The Appellant has failed to make enquiries of its own. The Appellant has,

further, failed to call any witnesses who were, or may have been, working on the relevant dates.

52. In respect of whether the Penalty has been correctly applied:

(1) The burden of proof is upon HMRC to show that the Appellant is liable to a penalty. If the Assessment is valid, the burden of proof is discharged in respect of the Penalty. In the event that para. 4 to Schedule 41 is satisfied, a person is liable to a penalty. There is a legitimate aim that those who are involved in alcohol fraud are liable to a penalty. The Appellant is attempting to launch an attack on the penalty regime.

(2) The conclusion was reached that there was insufficient evidence to uphold a deliberate penalty. Reductions are available where a taxpayer makes disclosure to HMRC, and where "special reduction" applies.

(3) There is no evidence to suggest that the Goods were destroyed or irretrievably lost, as opposed to being used on the open market. Being irretrievably lost is not the same as being used: *General Transport SPA v R & C Comrs* [2020] EWCA Civ 405, at [54]. The Appellant has not adduced any evidence to show that the Goods were "unusable".

(4) The Goods were liable to forfeiture since the excise duty had not been paid and were being held outside a duty suspension arrangement. In those circumstances, a penalty can be charged and it follows that there was no bar to the destruction, in the absence of a challenge or an unsuccessful challenge, by way of condemnation proceedings.

53. Mr Boyle's submissions can be summarised as follows:

(1) HMRC are out of time in raising the Assessment and HMRC are not able to raise the Penalty where a valid assessment has not been raised.

(2) The Penalty was raised more than one year after the day on which evidence of facts sufficient to allow an assessment to be made came to the knowledge of an officer. The Appellant cannot be held responsible for HMRC's poor record-keeping following the first visit on 5 December 2012. The conclusion reached during the first visit was that there was no evidence of any smuggling activity on the Appellant's site. HMRC have not established any change of circumstances that occurred after the first visit on 5 December 2012 and the Visit in 2014.

(3) The documents relied on by HMRC are third-party invoices and delivery notes. Informal and vague referencing on documents calls the legitimacy and validity of the paperwork HMRC rely on into question. Furthermore, the information included in the documents is inconsistent and incomplete. The Appellant uses formal references made up of numbers and letters.

(4) HMRC are also relying on various third-party witnesses whose statements include limited information which is at odds with the Appellant's premises and activities. There is no evidence that the Goods were collected from the Appellant's premises, or that the third parties entered the Appellant's premises.

(5) The Appellant is a recycling company and has never traded in alcohol. All vehicles entering the Appellant's premises are weighed and a record is kept. The third parties referred to by HMRC are not listed in the Appellant's visitor book as they did not enter, or leave, the Appellant's premises. Furthermore, the premises are in a secure location, with only one way in and out.

(6) HMRC have not provided sufficient evidence detailing the Goods themselves, or sufficient evidence in relation to collections from the Appellant's premises. They have further failed to properly consider the evidence and information provided to them by the Appellant, supporting the fact that the Appellant does not have any connection to the alleged transportation of alcohol.

(7) HMRC do not have sufficient evidence to show that the Appellant acted in a deliberate manner and it is not clear what HMRC are alleging.

(8) The Appellant denies that it: (i) has been involved in the trade or transportation of any alcoholic beverages; (ii) held the Goods at the time that they were released for consumption; or (iii) held the Goods outside a duty suspension arrangement.

(9) The case of *Davidson & Robinson* does not apply to the Appellant's circumstances.

54. Following completion of the appeal hearing, we reserved our decision, which we now give with reasons.

THE RELEVANT LAW

55. The relevant law, so far as is material to the issues in this appeal, is as follows:

Excise Duty Point

56. Where goods are held outside a duty suspension arrangement, and UK excise duty has not been paid, relieved, remitted or deferred under a duty deferment arrangement, a duty point is created under reg. 6(1) of the Excise Goods Regulations. Section 1 of the Finance (No. 2) Act 1992 contains the authority for making regulations to implement the provisions of Directive 2008/118/EC ('the 2008 Directive') concerning the chargeability of goods to excise duty in the United Kingdom, and persons liable to pay such duty. The Excise Goods Regulations implement provisions of the 2008 Directive.

57. Regulation 5 of the Excise Goods Regulations provides that there is an excise "duty point" at the time when excise goods are released for consumption in the United Kingdom. Regulation 6 of the Excise Goods Regulations provides that:

> "**6.**—(1) Excise goods are released for consumption in the United Kingdom at the time when the goods—
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and ... excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement."

58. Therefore, four excise duty points are prescribed by reg. 6.

59. Regulation 10(1) of the Excise Goods Regulations identifies the "person liable to pay the duty" when excise goods are "released for consumption", by virtue of reg. 6(1)(b), as the person "holding" excise goods at that time:

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

The Assessment

60. Section 12(1A) and 12(4) of the Finance Act 1994 ('FA 1994') provide that:

> "**12 Assessments to excise duty**
>
> (1A) Subject to subsection (4) below, where it appears to the Commissioners –
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount can be ascertained by the Commissioners, the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.
>
> ...
>
> (4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say –
>
> (a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and
>
> (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge"

61. Section 13A FA 1994 sets out the meaning of 'relevant decision' and s 16 deals with appeals to a tribunal:

> "**13A Meaning of "relevant decision**"
>
> (1) This section applies for the purposes of the following provisions of this Chapter.
>
> (2) A reference to a relevant decision is a reference to any of the following decisions—
>
> …
>
> (b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above."

62. In relation to appeals to the FtT, s 16 FA 1994 provides that:

> "**16 Appeals to a tribunal**
>
> …
>
> (1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—
>
> …
>
> (5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

63. Section 154(2)(a) of the Customs & Excise Management Act 1979 ('CEMA') provides that:

> "(2) Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not—
>
> (a) any duty has been paid or secured in respect of any goods; or

...

then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the customs and excise Acts, the burden of proof shall lie upon the other party to the proceedings."

The Penalty

64. Schedule 41 provides that:

"**4 Handling goods subject to excise duty**

(1) 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. ...

(2) In [this paragraph] –

"excise duty point" has the meaning given by section 1 of FA1992, and "goods" has the meaning given by section 1(1) of CEMA 1979.

…

6B The penalty payable under any of paragraphs 2, 3(1) and 4 is—

(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,

(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

…

[Emphasis added]

65. Paragraphs 12 and 13 of Schedule 41 provide for reductions for disclosure and whether the disclosure is prompted or unprompted.

66. Paragraph 14 of Schedule 41 provides for "special circumstances" to reduce a penalty,

67. Paragraph 19 sets out the FtT's jurisdiction. 'Flawed' means flawed in light of the principles applicable in judicial review proceedings.

FINDINGS OF FACT

68. We have derived considerable benefit from hearing the evidence and submissions and find as follows:

(1) The Appellant was incorporated in 2005 and its business activity is the treatment and disposal of non-hazardous waste. Mr Boyle is one of the Appellant's directors.

(2) The FIS visited the Appellant's premises on 5 December 2012 to inspect the Appellant's premises and ascertain if there were any alcohol products liable to excise duty on site. No revenue goods were found on the Appellant's premises and no further action was taken in respect of the Appellant. Officer Idowu did not form a part of the FIS team.

(3) Between 3 August 2012 and 22 January 2014, HMRC carried out investigations (supply chain checks) with various third-party hauliers, including Ascos, Fios, Abbey Logistics, Custom Haulage and Bassett & Sons. Witness statements were subsequently obtained from employees previous connected to the hauliers, which described the collection of goods (alcohol) from the Appellant's premises on 3 August 2012 and 15 August 2012.

(4) On 6 February 2013 Officer Idowu issued a referral form, requesting a visit to Custom Haulage to attain information on the 15 August 2012 collection. Custom Haulage provided tracking information for their vehicle and this information was reported back to Officer Idowu in a visit report, dated 12 March 2013.

(5) On 27 September 2013 Officer Idowu raised a referral for the Appellant to gather information for the case on Ascos, requesting details be gathered on the collections from the Appellant's site.

(6) On 22 January 2014, Officer Idowu visited Abbey Logistics, in relation to the collection on 13 August 2012, and spoke to Mr Farrell. Following this meeting, Stewart Allerton provided a witness statement stating that he had been asked to collect a load from the Appellant. On arrival, he was told that the load should be picked up from an alternative location in Peterborough. The load turned out to be alcohol.

(7) On 2 May 2014, HMRC visited Bassett & Sons where they spoke to Mr Wayne Bentley, who noted that on 3 August 2012, he was instructed to collect an unidentified load from the Appellant.

(8) The invoices and delivery notes obtained from the third parties shows that loads were collected from the Appellant's premises on various dates.

(9) On 21 March 2014, Officer Idowu visited the Appellant's premises and spoke to Mr Boyle to discuss the movement of alcohol. Officer Idowu showed Mr Boyle the documentation obtained from the third parties. Mr Boyle denies any involvement in alcohol by the Appellant as this was contrary to the Appellant's business model.

(10) Mr Boyle has/had 13 to 14 members of staff working on the Appellant's site during the relevant period. Mr Boyle spends a significant amount of his time working in his office where he occupies a desk that faces away from the entry to the Appellant's site/premises.

(11) Mr Boyle did not make any enquiries of the tenants who are said to occupy part of the premises on which the Appellant's site is located.

(12) The Appellant has not called any independent evidence from any employees who were working during the period covered by the investigations/checks.

69. Our findings above are based on a balanced appraisal of all of the evidence, despite our conclusion that Mr Boyle was a truthful witness who gave his evidence in a clear and straightforward manner, without equivocation.

DISCUSSION

70. The Appellant appeals against: (i) an Assessment to excise duty in the sum of £46,749; and (ii) a Penalty in the sum of £14,024.70 (reduced from £32,724.30). HMRC's position is that evidence received from three separate arm's length third parties (i.e., the third-party hauliers) revealed that two consignments of alcohol products had been collected from the Appellant's premises on 3 August 2012 and 15 August 2012, and had been transported to other destinations in circumstances where excise duty had not been paid. An investigation

was conducted to ascertain the Appellant's involvement, if any, in the storage and transportation of excise goods, leading up to the Assessment in 2015.

71. The relevant haulage invoices (all addressed to CJM) that had been obtained by HMRC confirming collection were as follows:

(1) R.G. Bassett & Sons Limited (Sales Invoice) – Job Number: 596090 – collection date: 3 August 2012 – Invoice Number 73276 – Invoice Date: 15 August 2012- Account Code: CASHS02;

(2) Abbey Logistics Group Ltd (Sales Invoice) – collection date: 14 August 2012 – Invoice Number: 1608 – Invoice Date: 18 August 2012;

(3) Custom Haulage Limited (Sales Invoice) – collection date: 15 August 2012 – Invoice Number: 2709 – Invoice Date: 16 August 2012 – Account Code: CJM.

72. All of the above invoices and other delivery/job notes named the collection point as being the Appellant's premises, and the delivery or end users were various cash and carries. HMRC concluded that the Appellant held and controlled excise goods outside of a duty suspension arrangement, and was liable to pay duty. There was no evidence to suggest that the goods were duty paid. HMRC's position is also that it was not possible to refine the Assessment from any documentation provided by the Appellant as there was no information available to identify specific liability.

73. Excise duty is charged when goods subject to excise duty, such as alcoholic beverages, are produced and imported, unless duty suspension arrangements apply to them. Excise duty is an indirect tax charged on specific goods deemed to be harmful to public health and is chargeable in addition to customs duty. Excise duty applies *inter alia*, to alcohol, tobacco products, gambling activities and hydrocarbon fuels (consumption tax). The duty falls at the time when goods leave any duty suspension arrangement. Excise goods subject to duty must, generally, be held in a 'tax warehouse', operated by an authorised warehouse keeper. If duty suspension arrangements do not apply, then chargeability to excise duty is deferred until the goods depart from a duty suspension arrangement. The identity of the person liable to pay the duty depends on the circumstances in which chargeability arises. The person liable to pay the duty is the person 'holding' the excise goods at the time. Penalties are charged for any wrongdoing.

74. The Appellant criticises the basis upon which the Assessment had been issued against the Appellant by reference to s 12(1) FA 94. The Assessment in this appeal was raised under s 12(1A) FA 94. The discretion to assess conferred upon the HMRC under s 12(1A) of the FA 1994 is limited. The boundaries of the discretion found in s 12(1A) are those contained in s 12(4). There are no words to be found in the legislation which confer a general supervisory jurisdiction over the HMRC'S exercise of discretion: *C & E Comrs v J H Corbitt (Numismatists) Ltd* [1981] AC 22, at 60H-61A (Lord Lane). The present appeal is not a s 16(4) appeal.

75. The FtT has power to review decisions of HMRC in a number of administrative areas which are specified in Schedule 5, FA 1994. These decisions are referred to, collectively, as "ancillary matters". Section 16(4) FA 1994 confers a limited jurisdiction on the FtT to examine the reasonableness of ancillary decisions, but with very limited powers to give effect to such findings. It would not allow the FtT, or the Upper Tribunal, to quash the decision appealed against: *CC&C Ltd. v R & C Comrs* [2015] 1 WLR 4043 ('*CC&C Ltd*'), at [16] (per Underhill LJ). Assessments to duty are not ancillary decisions. As the Court of Appeal in *CC&C Ltd*, observed, at [15]-[16], (per Underhill LJ with whom Lewison and Arden LJJ agreed), s 16(4) deals with management decisions involving some element of subjective

assessment. The FtT has no jurisdiction under s 16(5) to consider a Wednesbury unreasonableness challenge to an assessment issued on the basis that an excise duty point was triggered.

76. The jurisdiction invoked by the Appellant's appeal to the FtT was under s 16(5), and not that under s16(4). The jurisdiction of the FtT in respect of the Assessment is, therefore, determined by s 16(5) FA 1994. In this respect, the FtT has a full appellate jurisdiction: *Butlers Ship Stores v HMRC* [2018] UKUT 58 (TCC) ('*Butlers Ship*'), at [150].

77. In respect of the Penalty, on an appeal pursuant to para. 17(1) of Schedule 41, the FtT may affirm, or cancel, a penalty. On an appeal pursuant to para. 17(2), the FtT may: (i) affirm HMRC's decision; or (ii) substitute HMRC's decision for another decision that HMRC had the power to make.

Whether the Assessment and Penalty were issued in time

78. Mr Boyle submits that the Assessment, dated 11 March 2015, is out of time because all of the relevant evidence was held by HMRC following the first visit to the Appellant's premises on 5 December 2012. In further amplification of this argument, he submits that the conclusion of the visit on 5 December 2012 was that there was no evidence of smuggling activity on the Appellant's site.

79. Mr Carey, on the other hand, submits that at that stage (i.e., in 2012), what had taken place was little more than HMRC trying to identify matters that were relevant to the Assessment, without having sufficient evidence to proceed to make the Assessment. In this respect, he submits that the assessing officer was not part of the team (the FIS) that visited the Appellant's premises on 5 December 2012. Mr Carey further submits that additional investigative work was required to be undertaken before an assessment could be raised because of the requirement to assess the first duty point: *Davison & Robinson*. The witness statement provided by the drivers who were identified as having collected the Goods from the Appellant's premises then provided sufficient evidence such that HMRC could proceed to make the Assessment, after Mr Boyle had denied that the Appellant had any involvement in alcohol in 2014 when Officer Idowu visited the Appellant's premises.

80. In reliance on *DCM*, Mr Carey submits that it is the evidence which justified the assessment which was *in fact* made, and not the hypothetical assessment that might have been made, which is significant

81. The burden of proof is upon the Appellant to show that the Assessment was issued out of time: *Pegasus Birds Ltd v C & E Comrs* [1999] STC 95 ('*Pegasus Birds*'), at [101] – [102]. In *Pegasus Birds*, the court concluded that the correct approach for a tribunal to adopt is:

> (1) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment; and
>
> (2) to determine when the last piece of evidence of these facts of sufficient weight to justify the making of the assessment was "communicated" to the Commissioners. The period of one year runs from that date; and that
>
> (3) an officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment and, accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury; and
>
> (4) the burden is on the taxpayer to show that the assessment was made outside of the time-limit specified.

82. Dyson J held that the test is a subjective, rather than an objective, one. The Court of Appeal approved the test formulated by Dyson J: at [2000] STC 91. The court further made clear that it is the task of the tribunal to assess whether, as a matter of fact, the officer held the opinion in question. In a later case involving the same taxpayer, the court clarified the test to be applied in determining whether an assessment was to best judgment: [2004] EWCA Civ 1015. The correct test is whether there has been an honest and genuine attempt to make a reasoned assessment (per Carnwath LJ at [22]). These principles were reaffirmed by the Supreme Court in *DCM*. In *Lithuanian Beer Ltd v R & C Comrs* [2018] EWCA Civ 1406 ('*Lithuanian Beer*'), at [24], the Court of Appeal accepted that the propositions in *Pegasus Birds* equally apply to excise duty assessments, and to the time-limit specified in s 12(4)(b) FA 94. As held by the Upper Tribunal in *Rasul*, at [10], in reference to the decision in *Pegasus Birds*:

> "10. …The person whose opinion is to be imputed to HMRC is the person who decided to make the assessment, regardless of which person within HMRC acquired the knowledge of the facts in question…"

83. In *Lithuanian Beer*, the Court of Appeal considered the importance of the word "knowledge", finding that "constructive knowledge" was not sufficient. It is not, therefore, enough for the relevant HMRC officer to know that relevant evidence exists, if he does not know what its contents are, as this would amount to constructive knowledge of the facts said to be evidenced by the material in question. Furthermore, the court was satisfied that there is no distinction to be spelled out of the phrase "evidence of the facts" between knowing that evidence exists and knowing what that evidence reveals about the facts of the case. The court further considered that the last piece of evidence is "communicated" to the Commissioners when it is communicated in such a way that the contents of the evidence are, in fact, known to them. This requires the evidence to be digested by HMRC, and not just made available to HMRC.

84. By analogy, the court considered a situation where an HMRC officer is presented with a room full of documents and told that he can look at anything that he likes. The court found that in this situation, the officer will not have knowledge of the "evidence of facts" contained in each and every document in the room. The court held, at [26] to [30], that:

> "26. …If HMRC make a later assessment to claim underpaid tax, relying on a number of factual building blocks based on evidence they have seen, a shorter limitation period is appropriate if they knew about that evidence and what it revealed earlier on but sat on their hands and failed to take prompt action on the basis of it.
>
> 27. … The phrase, "sufficient in the opinion of the Commissioners to justify the making of the assessment", is a reference to the opinion actually formed by the Commissioners at the time when they issue the assessment which is in dispute in the proceedings…
>
> 28. Sub-paragraph (b) in section 12(4) requires that one identifies the evidence taken into account by the officer who issues the assessment as the justification for issuing it (or, under proposition 5, the evidence of which he was aware which ought rationally to have compelled him to reach the opinion that an assessment would be justified at some earlier stage), and compares that with the "evidence of facts" which it is said the Commissioners knew a year or more before the assessment came to be issued. Both elements in the comparison turn on the subjective state of mind of HMRC officers regarding what they understand the evidence available to them actually shows. If the "evidence of facts" known to the Commissioners previously was the same as the evidence of facts which led them to form the opinion later on that an assessment was justified (or, on a *Wednesbury* approach, should have led them to form that opinion), then it will be clear that the Commissioners have sat on their hands and the special, truncated limitation period in sub-paragraph (b) will apply.

29. It is this comparative exercise to which Dyson J refers in proposition 4(ii). In my view, it is clear that where he speaks of the last piece of evidence being "communicated" to the Commissioners, he means that it is communicated in such a way that the contents of the evidence are in fact known to them. He does not mean that it is sufficient that the evidence is made available to them, although it is not read and digested by them.

30. …The officer will only have such knowledge where he reads and digests the contents of particular documents…"

[Emphasis added]

85. In relation to the issue of whether there is a concept of "collective knowledge", in *Tooth* - where the Supreme Court was considering the meaning of "deliberate" in the context of Schedule 24 of the Finance Act 2007 and a discovery assessment - the Supreme Court considered the operation of s 29(1) of the Taxes Management Act 1970 ('TMA'), which confers two separate powers; namely:

(1) Power on "*an officer of the Board*" if he discovers a matter falling within sub-paras. (a) to (c) to make the assessment which ought "*in his opinion*" to be charged to make good the loss of tax; and

(2) Power on "*the Board*" themselves to make an assessment according to "*their opinion*" if the Board discovers the deficiency of tax.

86. The Supreme Court held, at [68] and [69], *inter alia*, that:

"68. …Moreover, the language and structure of the provision would make no sense if its operation turned on a concept of collective knowledge of the Board, derived from the knowledge of any and all of its officers"

87. And that:

"68. …the condition in section 29(5) operates by reference to the state of mind of a particular hypothetical officer of the board dealing with the taxpayer's case at a particular point in time..."

88. And, at [69], that:

"69. …The officer in question needs to know if a discovery has been made in order to know if they have power under section 29(1) to issue an assessment and reference to their own state of mind enables them to know with confidence whether they have that power."

89. The case of *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 considered "the Carltona principle", which takes its name from *Carltona Ltd v Commissioner for Works* [1943] 2 All ER 560, in relation to implied delegation of decision-making functions to civil servants within government departments, at [23] to [38] (Sedley LJ) and [71] to [74] (Keene LJ), as follows:

"23. The next question is altogether more profound. It is not answered, only broached, by the historic decision of this court in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. There the court was presented with an attempt to transpose a familiar doctrine of the law of agency – the rule that one who is delegated cannot himself delegate - into the field of public administration, treating the minister as the Crown's delegate…

24. *Carltona*, however, establishes only that the act of a duly authorised civil servant is in law the act of his or her minister. It does not decide or even suggest that what the civil servant knows is in law the minister's knowledge, regardless of whether the latter actually knows it."

90. Sedley LJ added this, at [71] to [74]:

"71. I agree and wish to add only a few comments of my own on the issue of the extent of the minister's knowledge, because of its importance in administrative law. It is vital to distinguish

between two situations. The first is where a civil servant makes a decision in the name of his government minister, often a Secretary of State, where a statute has vested the decision – making power in the Secretary of State. In such a situation the *Carltona* case establishes that the civil servant acts, and is entitled to act, in the name of the minister.

72. The second situation is where a minister is himself actually the decision-maker. *Carltona* says nothing about the imputing of the knowledge of relevant facts to the minister merely because those facts are known to one or more of his civil servants, no matter how senior. Nor in my judgment does the passage from Lord Diplock's speech in *Bushell* establish any such proposition. That was a case concerned with whether or not it was unfair for a government minister to receive advice and information from his civil servants without it being disclosed to those who had objected at a public inquiry and without it being tested through the inquiry processes. *Bushell* was not dealing with whether a government minister is assumed to know what his civil servants know when the issue is whether he has taken relevant matters into consideration in arriving at his own personal decision.

73. Where the decision is in truth one taken personally by a minister, the normal principles of administrative law will apply, so that on a challenge by way of judicial review the court will consider whether the minister as decision-maker has taken into account irrelevant considerations or failed to take into account relevant ones. Where the decision- maker is in fact a civil servant, the same principles apply to that civil servant's decision, albeit the discussion will nominally refer to "the Secretary of State". This approach accords with the decision of the High Court of Australia in the *Peko-Wallsend* case…

74. The implication of Mr Cavanagh's submission, as he frankly acknowledged, is that a minister who *personally* makes a decision of this kind can do so validly, even though in complete ignorance of an important and highly relevant consideration, so long as his civil servants know about it. I cannot accept that that is the law. To take an example discussed in argument, it would mean that the Secretary of State could personally decide that planning permission should be granted for a major housing development in the approved Green Belt without being aware of the Green Belt status of the land in question. If that were held to be a valid and *intra vires* decision by him, it would negate basic propositions of English administrative law established well before *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223."

91. It is, therefore, clear that there is no doctrine of "collective knowledge". This has the same effect as express delegation of power: s 13(1) of the Commissioners for Revenue and Customs Act 2005 ('CRCA').

92. Having considered all of the evidence, we find that the visit on 5 December 2012 was conducted by the FIS, at which time Officer Idowu (the assessing officer) formed part of the CITEX/ISBC Team. Officer Idowu did not attend the Appellant's premises on 5 December 2012 and his involvement in the investigation only began significantly later. We find that the earliest date of his involvement was 6 February 2013. At that stage, the supply chain enquiries had only just begun. The investigative work that took place following on from the visits to third-party hauliers was ongoing until the end of 2013/beginning of 2014. We accept that whilst Officer Idowu may have inferred from the delivery documentation that alcoholic goods had been collected from the Appellant's premises, this was not ascertained until after Officer Idowu made enquiries on 2 May 2014 with Bassetts & Sons, and with Mr Bentley in particular. It was only as a result of those enquiries that HMRC acquired knowledge of the contents of the load collected from the Appellant's site on 3 August 2012 (being mixed wines and beers).

93. We accept that it was reasonable for Officer Idowu to seek further evidence to verify the information provided to him during the investigation. In relation to HMRC's duty to assess against the earliest duty point which can be established, we accept that it was reasonable for Officer Idowu to make enquiries with the Appellant in order to check for

evidence of facts, including any facts on which HMRC might have established an earlier duty point. All of the information gathered pointed towards the Appellant's premises as being the place from which excise goods were collected.

94. We are satisfied, from the chronology given, that Officer Idowu did not obtain all of the relevant information until 21 March 2014. Before the Visit to the Appellant's premises on this date, it is reasonable to believe that Officer Idowu was expecting to identify an earlier duty point. HMRC's enquiries and investigations would have been based around tracing the whole supply-chain, back to the point of importation (or production). We find that there is considerable force in Mr Carey's submission that it is the evidence which justified the Assessment which was, in fact, made and not a hypothetical assessment that might have been made. The Assessment was then made in March 2015 and is in time (given the timing of the visit to the Appellant's premises in 2014 when the last piece of information was communicated to Officer Idowu).

95. The Assessment is the "assessment of the amount of any duty of excise due". The application of the time-limit in s12(4)(b) will only arise once an assessment to the amount of duty has been made. It will be a question of fact for the Tribunal, having considered the evidence, as to which facts justified the Assessment that was made from the point of view of the officer who made the Assessment. As established by case law, there is then to consider when the last piece of evidence of sufficient weight in relation to the fact came before the Commissioners. It is at this point when the time-limit in s 12(4)(b) starts to run. The 12-month time-limit for the purposes of s 12(4)(b) did not expire until 21 March 2015. The Assessment was issued on 11 March 2015, within the time-limit.

96. The Appellant also challenges the Penalty on the same basis as the Assessment. HMRC submit that the Appellant's position is predicated upon a misunderstanding of when the penalty assessment time-limit commences, and that even if the Assessment is out of time, that does not change liability to excise duty as a matter of fact. The question of liability to a penalty, and the provisions in s 13A(2) FA 1994, were considered in *Caerdav Ltd v R & C Comrs* [2023] UKUT 179 (TCC), at [146] to [159]. A material question in the respect of whether the Assessment is in time is: *when did the last piece of information that was critical to the assessment come to HMRC's knowledge?* The question requires identification of the evidence taken into account by the officer who issues the assessment as the justification for issuing it; or the evidence of which he was aware which ought, rationally, to have compelled him to reach the opinion that an assessment would be justified at some earlier stage. This turns on the subjective state of mind of HMRC officers regarding what they understand the evidence available to them actually shows.

97. Paragraph 16(4)(a) of Schedule 41 provides that the time-limit operates from the time that the excise assessment has been determined. The Assessment in this appeal is the subject of this appeal and has not, therefore, been finally determined. The Penalty was issued on 23 February 2016 and, consequently, is in time.

98. We hold that the Assessment and the Penalty were issued in time.

Whether the Appellant had any involvement in the Goods

99. Mr Boyle submits that the Appellant is a recycling company that has never traded in alcohol. He further submits that the Appellant's premises are in a secure location, with one way 'in' and 'out', and that all commercial vehicles entering its premises are weighed, and a record is kept. In this respect, his submissions are that the third parties referred to by HMRC are not recorded, or listed in the Appellant's visitor book. The third-party statements obtained by HMRC are further submitted by Mr Boyle to be at odds with the layout of the Appellant's

premises. Furthermore, it is submitted on behalf of the Appellant that the documentation relied on by HMRC (as obtained from the third parties) is not consistent with the Appellant's own documentation as the Appellant uses formal references made up of a combination of numbers and letters (in its invoices and delivery notes).

100. HMRC acknowledge that: (i) the sale and movement of alcohol may not typically be indicative of the Appellant's ordinary trading; and (ii) the Appellant has evidenced a log of entries to its premises on or about the relevant dates, but Mr Carey submits that the clear and overwhelming inference that can be made from the third-party evidence is that there was alcohol being collected from the Appellant's premises. The evidence obtained from the hauliers demonstrated, in HMRC's view, that the hauliers were told to collect the Goods from the Appellant's premises. The clear and overwhelming inference was that alcohol was being collected from the Appellant's premises, and that someone at the Appellant's premises must, therefore, have been engaging in the facilitation of the collection of the alcohol. The explanation given by the hauliers was considered to be clear and unequivocal, and the drivers had identified the Appellant's address.

101. Ultimately, Mr Carey submits that the Appellant is liable to the excise assessment because it was "holding" the goods within the meaning of the Excise Duty Regulations, and as a person who handled the goods (i.e., for the purposes of para. 4 of Schedule 41), and that the Appellant was able to control access to its premises upon which the collections took place.

102. During the appeal hearing, Mr Carey submitted that three separate arms-length entities who collected the alcohol could not each have come up with the same factual matrix, particularly in light of the vehicle tracking information held in respect of one of the hauliers (Customs Haulage). In his view, the more likely explanation was that the Appellant had an employee who was facilitating the collection. He further submitted that the purpose of the Excise Directive was to cast a wide net, which would encourage the collection of duty.

103. We have considered the authorities to which we were referred:

104. The Appellant's appeal was previously stayed pending the outcome of the decision of the Upper Tribunal in *B & M Retail Ltd v HMRC* [2016] UKUT 429 (TCC) ('*B & M Retail*'). In *B & M Retail*, the Upper Tribunal decided that a person holding excise duty goods in respect of which duty had not been paid could be assessed under reg. 6(1)(b) of the Excise Goods Regulations. This was notwithstanding the fact that, in principle, an earlier release for consumption had occurred. Since the decision in *B & M Retail*, the Upper Tribunal has handed down the decision in *Davison & Robinson*, which we consider later.

105. Where HMRC assess the person holding duty unpaid goods, a challenge to the assessment on the basis that there was an earlier excise duty point can only be successful if it can be established:

(1) Who had physical possession at the time the duty point is said to have occurred;

(2) Who is alleged to have control over the goods and who should be assessed;

(3) How the person has control over the goods and the basis on which that control is being exercised;

(4) When the excise duty point arose – the date of an invoice is not sufficient in itself without establishing who was in possession of the goods at some identified point(s) in time; and

(5) Where the goods were being held at the relevant time.

106. The case of *Dawson's* concerned a wholesaler of alcoholic drinks. HMRC assessed that it owed around £3,700,000 of excise duty on the basis that there was insufficient evidence that excise duty had been paid on certain supplies of good made and physically held by it. HMRC traced the supply chain back from Dawson's supplies to missing, de-registered or hijacked companies. Dawson's was assessed because HMRC had no evidence that excise duty was paid on the goods and could not establish that any of the companies appearing further back in the supply chain took physical possession of the goods. The Upper Tribunal held that the starting point in determining who is 'holding' the goods at the relevant time must be the person who has physical possession of them. Once the physical holder of the goods is identified, the correct approach is to then consider whether the circumstances of that possession are such that it is inappropriate for that person to be considered to be holding the goods. The Court of Appeal held, at [76], that:

> "... Anyone in physical possession of excise goods who was assessed for excise duty would immediately 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 were not liable".

107. The Upper Tribunal, therefore, held that it is possible for a person with control over the goods, as opposed to physical possession, to be treated as 'holding' them. This is as a result of an absence of an earlier duty point. The Upper Tribunal however found that it was up to the person assessed to establish that a person earlier in the supply chain had been holding the goods and should be assessed instead. The Upper Tribunal stated that in the absence of any evidence that establishes an earlier duty point, the person holding the goods at the time that it is established that the goods are being held at a specific location, but are no longer held pursuant to a duty suspension arrangement, is chargeable to the unpaid duty.

108. The Upper Tribunal had earlier ruled, in *Davison & Robinson*, that HMRC has no discretion as to who to assess where there have been multiple holders of the goods and excise duty has not been paid. All that HMRC are required to do is to assess the person they find to be holding the goods in question, if that is the only excise duty point which can be established. The case presented on behalf of the Appellant in *Davison & Robinson* was that *B & M Retail* was wrongly decided. Further, and alternatively, the appellant argued that the issue of whether there could be more than one excise duty point should be referred to the Court of Justice of the European Union ('CJEU').

109. In *Perfect v HMRC* [2020] STC 705 ('*Perfect*'), Mr Perfect was stopped by UK Border Force at Dover Docks driving a lorry containing pallets of beer, in respect of which excise duty had not been paid. Mr Perfect knew that he was carrying beer, but did not know (i) who owned the lorry; (ii) that duty had not been paid; and (iii) that the documentation which accompanied the load related to a previous consignment. The lorry and the goods were seized. Although HMRC accepted that the evidence did not show that Mr Perfect was actively involved in the attempts to smuggle goods into the UK, or that he deliberately attempted to evade excise duty, he was assessed for excise duty on the basis that he was holding the goods.

110. Both the FtT and the Upper Tribunal had found that Mr Perfect could not be held liable for the unpaid excise duty on the goods. On appeal to the Court of Appeal, the court accepted that where the driver is the only identifiable person who can be assessed, the opportunity for smuggling and fraud would be manifestly greater if the courts and tribunals conclude that he cannot be assessed if he was unaware that the goods were liable to duty. The court further held that the natural meaning of the words "holding" or "making delivery" do not impute any requirement for the person to be aware of the tax status of the goods. At [22] (Newey LJ with whom Baker and Snowden LJJ agreed), the court found that 'knowledge' or 'means of

knowledge' is irrelevant to liability. The court, therefore, approved the conclusions of the Upper Tribunal, in *Davison & Robinson Ltd.* The court further commented that the EU principles of proportionality and fairness do not exclude the imposition of strict liability. The Court of Appeal in *Perfect* concluded thus:

> "23. It follows that the fact that Mr Perfect had neither actual nor constructive knowledge of the smuggling of the beer he was carrying cannot exempt him from liability from excise duty."

111. The case was referred to the CJEU', given the fundamental importance of proportionality in EU law. In *WR*, the CJEU considered the concept of who 'holds' goods. The court held, at [24], that:

> "The concept of a person who 'holds' goods refers, in everyday language, to a person who is in physical possession of those goods. In that regard, the question whether the person concerned has a right to or any interest in the goods which that person holds is irrelevant."

112. And at [27] to [31]:

> "27. …the person liable to pay the excise duty is, in accordance with Article 8(1)(b) of that directive, 'the person holding [those] ... goods and any other person involved in the holding of the excise goods'.
>
> 28. However, like Article 33(3) of Directive 2008/118, Article 8(1)(b) of that directive does not contain any express definition of the concept of 'holding' and <u>does not require the person concerned to be the holder of a right or to have any interest in relation to the goods which that person holds, or that that person be aware or that he should reasonably have been aware that the excise duty is chargeable under that provision</u>.
>
> 29. By contrast, in a situation different from that referred to in Article 33(3) of Directive 2008/118, that is to say, in the case of an irregularity during a movement of excise goods under a duty suspension arrangement, within the meaning of Article 4(7) of that directive, Article 8(1)(a)(ii) of that directive provides for liability to pay the excise duty on the part of any person who participated in the irregular departure of those goods from the duty suspension arrangement and who, furthermore, 'was aware or who should reasonably have been aware of the irregular nature of the departure'. The EU legislature did not restate this second condition, which can be regarded as requiring an element of intention, either in Article 33(3) or, moreover, in Article 8(1)(b) of that directive (see, by analogy, judgment of 17 October 2019, Comida paralela 12, C-579/18, EU:C:2019:875, paragraph 39).
>
> 30. It follows that, where, in Directive 2008/118, the EU legislature intended that an intentional element be taken into account for the purpose of determining the person liable to pay the excise duty, it has laid down an express provision to that effect in that directive.
>
> 31. Furthermore, an interpretation limiting the status of person liable to pay the excise duty as being 'the person ... holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, to those persons who are aware or should reasonably have been aware that excise duty has become chargeable would not be consistent with the objectives pursued by Directive 2008/118, which include the prevention of possible tax evasion, avoidance and abuse (see, to that effect, judgment of 29 June 2017, Commission v Portugal, C-126/15, EU:C:2017:504, paragraph 59)."

113. And also, at [34]:

> "34. However, to impose an additional condition requiring that the 'person ... holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty."

114. The agreement between the United Kingdom and the EU setting out the arrangements for the UK's withdrawal from the EU ('the Withdrawal Agreement') Treaty Series No. 3 (2020) provides for judgments of the CJEU handed down after 31 December 2020 to have "binding force in their entirety on and in the United Kingdom if given in respect of references made by the United Kingdom before the end of 2020.

115. In the context of excise assessments, the Court of Appeal noted in *Perfect*, at [66] – [67], (and repeated at [10] of the Court of Appeal's further judgment in the case following a CJEU reference at [2022] 1 WLR 3180) that:

> "66. We agree that the underlying policy of the 2008 Directive is, as identified by the Upper Tribunal in B & M, that it is the obligation of every member state to ensure that duty is paid on goods that are found to have been released for consumption. It would be a distortion of the internal market were member states not to take steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the single market alongside goods on which duty has been paid. ...
>
> 67. This policy is, to our eyes, reflected in the terms of the Directive and the Regulations. ... Although fairness and proportionality are, of course, cornerstones of EU law, as they are of the common law, they do not invariably exclude the imposition of strict liability. We consider that there is very considerable force in the argument that, given the policy underlying the Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality."

116. The objective (legitimate aim) of the HMRC's powers to issue assessments is to secure the payment of excise duty which is owed. The use of such powers is appropriate to achieving that aim where a person holding goods is assessed at the first assessable duty point. The evidence obtained from the third-party hauliers was that on 3 August 2012, Wayne Bentley, working for Bassett & Sons Ltd., collected 26 pallets of alcohol from the Appellant. On 15 August 2012, Dean West, employed by Custom Haulage Ltd, collected 26 pallets of mixed beer from the Appellant's premises. Over and above the documentation provided from the hauliers was vehicle tracking information, which supported the claimed collection at the Appellant's premises on that date. We accept that the reasonable inference that can be drawn from the evidence was that the Appellant had involvement/held excise goods.

117. Whilst we have considered Mr Boyle's evidence that the third-party hauliers are not recorded in the Appellant's visitor log, we find that the Appellant has not been able to point to any other entities higher up in any supply-chain in relation to the duty point. More importantly, despite referring to other tenants on site, and the failure of HMRC to speak to those tenants, the Appellant has not conducted any enquiries of its own in this respect. We accept that a conversation relating to excise goods would have been a sensitive one to have with the tenants. However, the incontrovertible fact in this appeal is that the Appellant's premises have been identified by separate entities as the place from which excise goods were collected, and this has resulted in the Assessments.

118. We find that the Appellant's entire case rested on the business model being contrary to the suggestion that the Appellant would have any involvement in alcohol. There was no suggestion, on behalf of the Appellant, that CJM could be regarded as holding the excise goods as CJM's involvement appears to have predated the arrival of the Goods at Freedom Farm (even if only for a matter of hours). The issue of whether CJM had control of the Goods, in the sense that they were able to direct where the Goods were going to be collected and delivered, was not one that was explored, or suggested, before us. We are satisfied that supply-chain investigations were conducted by HMRC and the third-party hauliers (including CJM) pointed to the Appellant's premises as being where the Goods were delivered/collected, and that is the duty point that has been identified by HMRC.

119. We acknowledge that what the Appellant has been required to prove is a negative, as the Goods were never found in the Appellant's physical possession and the holding/movement of alcohol is contrary to the Appellant's business model. The Appellant however has control over its premises. We find that despite referring to various employees who worked for the Appellant at the relevant time of HMRC's enquiries/investigation, the Appellant has not called any evidence from its employees in relation to the events that took place on site on the dates that alcohol was said to be collected from its premises. Mr Boyle explained that he spends time working from his office on site. Whilst the entrance to the Appellant's premises is visible from the office window, his desk faces away from that window and he would not have had any way of knowing everything that was taking place outside at all times.

120. We accept that the Appellant's environmental permit regulates waste operations on its site and requires records to be kept of the acceptance and despatch of waste. We, however, find that there is considerable force in Mr Carey's submission that it is not to be expected that such records would document the entry and despatch of vehicles which were not transporting waste to the Appellant's site. The weighbridge tickets and the environmental permit are, therefore, irrelevant to the assessments under appeal, which relate to consignments of alcohol which may have been destined for various cash and carries.

121. Having considered the authorities and the evidence, we hold that the Appellant is liable for the unpaid duty because it was holding (within the meaning of the Excise Duty Regulations) the Goods collected from its premises. Furthermore, we find that the Appellant was able to control access to its premises, upon which the collections took place.

122. The Assessment was made under s 12(1A) FA 94, which provides that an assessment may be made where it appears (to the Commissioners) that the amount due can be ascertained (by the Commissioners). No goods have ever been found and the exact quantity of those goods has not been ascertained. Mr Boyle submits that duty cannot be calculated because the Goods, and quantity, have not been identified.

123. Mr Carey submits that all that is required is that an assessment is made to the best of their ability, and that HMRC have taken into account the handwritten logs that the Appellant has provided. The conclusion reached, however, is that these do very little to suggest the Assessment is wrong given that there are multiple entities who identified the Appellant's address as the collection address. He adds that there has been no attempt by the Appellant to make enquiries of its own, or any attempt to call any witnesses who may have been working on the relevant dates to give evidence. Mr Carey submits that best judgment only arises if the Assessment was made randomly, arbitrarily, capriciously or maliciously. In *Van Boeckel*, Woolf J (as he then was) said this in respect of assessments, at p. 296:

> "If they do make investigations then they have got to take into account material disclosed by those investigations."

124. Woolf J drew three conclusions in relation to the obligation that is upon HMRC. Firstly, there must be some material before HMRC on which they can base their judgment. Secondly, HMRC are not required to do the work for the taxpayer in order to form a conclusion as to the amount of tax due. Thirdly, HMRC are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Carnwath LJ cited the same passages in *Rahman* where he said this, at p 835:

> "…the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment is missing; or is 'wholly

unreasonable'. In substance those tests are indistinguishable from the familiar *Wednesbury* principles (see *Associated Provincial Picture Houses ltd v Wednesbury Corp* [1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment."

125. The threshold for making a "best judgment" assessment is therefore a low one. The correct test is whether there has been an honest and genuine attempt to make a reasoned assessment: *Pegasus Birds*, at [22] (per Carnwath LJ). This does not translate to meaning that whether an assessment could be said to be "wholly unreasonable" is irrelevant to determining that question: *Pegasus Birds*, at [77] (per Chadwick LJ). HMRC only need to consider the information before them in a fair way and come to a decision which is reasonable (and not arbitrary) as to the amount of tax due. In *Corneill v HMRC* [2007] EWHC 715 (Ch), at [32] and [33], Mann J found, in respect of a similar provision requiring the liability to be ascertained, that it was appropriate to draw inferences from the available evidence.

126. When considering circumstantial evidence, the Tribunal is required to assess the evidence as a whole: *Davis & Dan Ltd v HMRC* [2016] EWCA Civ 142; [2016] STC 1236 (Arden LJ at [57] to [60]). We have found that the documents relied on by HMRC name the collection point as the Appellant's premises, and the delivery or end user are cash and carries. Whilst Mr Boyle challenged the documents, the challenge did not extend to the descriptions contained in the documents. One of the documents states: "*26 Pallets Lager*". The documentary evidence was coupled with statements obtained from the drivers of the hauliers in question, which supported the conclusion that the Appellant's premises had been used as a collection point. The evidence, when taken as a whole, strongly suggested that the duty point first arose when goods were collected from the Appellant's premises.

127. The calculation of the Assessment was, ultimately, based on the conclusion that there were two full loads of beer (26 pallets) collected from the Appellant's premises. In this case, the best evidence available is from the hauliers who noted the collection address as being from the Appellant. Officer Idowu's calculation was based on a standard load of an average quantity and strength of beer, which provided the Appellant with the benefit of the doubt, given that the proportion of wine (which attracts a higher rate of duty) in the load collected on 3 August 2012 was unknown. We are satisfied that Officer Idowu made a reasonable calculation of the amount of duty due. The duty due has, therefore, been ascertained for the purposes of s 12(1A) FA 94, and paras. 9 and 10 of Schedule 41.

Whether the Penalty has been properly applied

128. Under Schedule 41, a penalty is payable if, 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". In the event that para. 4 of Schedule 41 is satisfied, a person is liable to a penalty. Reductions are available when disclosures are made to HMRC.

129. Mr Boyle submits that a non-deliberate penalty cannot be sustained. He further submits, that the Penalty cannot be applied because the Goods have been destroyed. Mr Boyle submits that, since access to its site is secure and controlled, the alleged wrongdoing could not possibly have been non-deliberate.

130. Mr Carey submits that if the criteria set out in para. 4 of Schedule 41 are met, liability to a penalty arises, and that: (i) there is no evidence to suggest that the Goods were destroyed or irretrievably lost as opposed to being used on the open market - the excise fraud having been successful; (ii) the Appellant has not adduced any evidence to show that the Goods were "unusable"; and (iii) the Goods were liable to forfeiture as excise duty had not been paid while the Goods were being held outside of duty suspense. In those circumstances, he submits, a penalty can be charged.

131. In *Euro Wines*, the Court of Appeal said this, at [3]:

> "3. As is apparent from the terms of paragraph 4(1), a penalty may be imposed on any person irrespective of their own ability to pay the excise duty on the goods. It is enough if they have come into possession of the goods or been concerned in their carriage etc. at a time when duty should have been, but has not been, paid…"

132. The Penalty calculated is a percentage of the PLR. The first stage is to consider the penalty range. The penalty range depends on behaviour (the behaviour that led to the wrongdoing) and disclosure (whether this was prompted or unprompted). The penalty range in this appeal is 35% to 70%.

133. The second stage is that relating to reductions for the quality of any disclosure. In relation to "*Telling*", the conclusion reached by HMRC was that there was a total denial of any activities having taken place. In relation to "*Helping*", the conclusion reached was that there was a total denial of any activities having taken place. In relation to "*Giving*", the conclusion reached was that, once again, there was a total denial of any activities having taken place. No reductions were, therefore, given.

134. The third stage is that relating to calculation of the penalty percentage. HMRC worked out the difference between the minimum and maximum penalty percentages, then multiplied that figure by the total reduction to get the percentage reduction. HMRC then reduced the percentage reduction from the maximum penalty percentage that could be charge, giving the penalty percentage. Based on the information HMRC had, they did not consider there are any special circumstances which would lead them to further reduce the Penalty.

135. As considered earlier, following the Visit to the Appellant's premises on the 21 March 2014, the Appellant was considered to have been instrumental in facilitating the movement of two loads of alcohol from its premises to addresses in Liverpool and Doncaster, in August 2012. Mr Boyle was shown three invoices from third-party hauliers, each stating that they picked up full loads of alcohol from the site. The collections were done over a two-week period in August 2012. The Appellant was afforded an opportunity to put forward any evidence in support of its position. HMRC have concluded that there was no deliberate action on the Appellant's part. This reduced the penalty from £32,724.30 to £14,024.70. We find that the Penalty was properly applied.

CONCLUSIONS

136. On the basis of our findings above, we hold that:

(1) the Assessment and Penalty were in time;

(2) the Appellant held or had involvement in the Goods;

(3) the Assessment was made on all of the available evidence and the Assessment stands; and

(4) the Penalty has been properly applied and we uphold the Penalty.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

137. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 02nd MAY 2024