[2021] UKFTT 0441 (TC)

TC 08325A/V

EXCISE DUTY—Appeal against assessment in respect of duty unpaid cigarettes—Whether Appellant is the "holder" of goods liable to pay the excise duty—Whether an earlier duty point can be established—Excise Goods (Holding, Movement and Duty Point) Regulations 2010, reg 10

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04051
TC/2019/00317

BETWEEN

GARY TURTON
MATTHEW ADAMS **Appellants**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
GILL HUNTER

The hearing took place on 16 and 17 November 2021. The form of the hearing was V (video). All participants in the hearing attended remotely and the remote platform was Video Hearings Service. A face-to-face hearing was not held because of the COVID-19 pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Both Appellants in person

Rupert Davies, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In appeal number TC/2018/04051 (Turton), the appeal against the decision of HMRC to raise excise duty assessment reference number EXA10915-2016, notified on 19 October 2016, is dismissed.

2. In appeal number TC/2019/00317 (Adams), the appeal is allowed, and the decision of HMRC to raise excise duty assessment reference number EXA10916-2016, notified on 19 October 2016, is set aside.

REASONS

SUMMARY

3. The Appellants appeal against decisions of HMRC assessing them to excise duty in relation to duty unpaid cigarettes.

4. Both assessments were issued in consequence of an unannounced visit by HMRC officers at a storage unit in October 2015. At the time of the visit, Mr Turton was found alone inside the unit in which 460,000 duty unpaid cigarettes were located in unmarked boxes, while Mr Adams was found in his van parked in front of the unit in which there were a further 40,000 duty unpaid cigarettes in identical unmarked boxes. Mr Turton was assessed to excise duty on the 460,000 cigarettes in the unit, and Mr Adams was assessed to duty on the 40,000 cigarettes in his van.

5. In this decision, the Tribunal dismisses the appeal of Mr Turton and allows the appeal of Mr Adams.

6. Mr Turton's case is that he was not the occupier of the unit nor the owner of the cigarettes, that he had been given a one-off task to go to the unit to hand over four boxes to someone who was coming to collect them, that he was unaware of the contents of the boxes, that he never touched or had anything to do with any of the boxes other than the four that he handed over, and that HMRC had failed to investigate to find those who were really responsible. This decision finds as follows. Mr Turton was at the time the "holder" of the cigarettes in the unit within the meaning of regulation 10 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, on the basis that he was in "physical possession" of them within the meaning of that expression as used by the Court of Justice of European Union in Case C-279/19, *Commissioners for Her Majesty's Revenue and Customs v WR*, ECLI:EU:C:2021:473. It is immaterial whether he had any right to or interest in the cigarettes, or whether he was or should have been aware that they were subject to or had become chargeable to excise duty. (See paragraphs 33, 42-56 and 70-77 below.) The Tribunal cannot overturn an assessment on the ground that HMRC investigations into a possible earlier duty point have been inadequate, and even if the Tribunal could do so, Mr Turton has not established any relevant inadequacy in the HMRC investigations (see paragraphs 34-37, 63-69 and 78-83 below).

7. In the case of Mr Adams, the Tribunal finds that the 40,000 cigarettes found in his van had, immediately before the HMRC visit, been obtained by him from Mr Turton from the stock of boxes inside the unit. It is therefore established that Mr Turton was a prior holder of the cigarettes found in Mr Adams's van, such that Mr Turton rather than Mr Adams should have been assessed for the duty on these cigarettes. However, the Tribunal cannot find that Mr Turton is liable to the excise duty on those 40,000 cigarettes as HMRC have not assessed him to that excise duty, and HMRC are now out of time to do so. (See paragraphs 34-36, 57-62 and 88-91 below.)

FACTS

8. On 28 October 2015, at about 1:00 pm, HMRC officers conducted an unannounced visit at a rental storage unit at a business unit facility. At the time of the visit, a van belonging to Mr Adams was backed up to an open door of the unit. The HMRC officers found Mr Turton alone inside the unit, and found Mr Adams in the rear of the van.

9. The HMRC officers discovered 460,000 Excellence brand cigarettes inside the warehouse in 46 unmarked white boxes, and a further 40,000 Excellence brand cigarettes in the rear of Mr Adams's van in four unmarked white boxes identical to those found in the unit.

10. The cigarettes were of a brand that is not legitimately available for commercial sale in the United Kingdom and bore none of the usual tax markings that would be found if United Kingdom excise duty had been paid.

11. Mr Turton and Mr Adams were arrested by the HMRC officers on suspicion of fraudulent evasion of excise duty. They were both taken to a police station where they were interviewed separately under caution at just after 4.30 pm. Mr Turton in his interview responded "no comment" to all of the questions put to him. Mr Adams in his interview said that someone he had never met before had come into his shop that morning and had tasked him with driving to the unit to pick up five boxes of knives and to bring them back to his shop, from where someone else would collect them from him. He said further that the person tasking him had given him cash to hand over to the person in the unit who would give him the boxes, that he did not know Mr Turton and had never seen him before, and that he had never been tasked to do this kind of job before. At and since that interview, he has declined to identify the person who he says tasked him to go to the unit.

12. HMRC officers seized the cigarettes, the van, and a quantity of cash found in the van as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("**CEMA**") and regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "**2010 Regulations**"). Mr Turton was issued with a seizure information notice in relation to the cigarettes found in the unit, and Mr Adams was issued with a seizure information notice in relation to those found in the van.

13. HMRC then commenced a criminal investigation in connection with the incident.

14. On 19 October 2016, HMRC issued to Mr Turton and Mr Adams, pursuant to s 12(1) of the Finance Act 1994, the respective assessments now under appeal. The assessment issued to Mr Turton was for excise duty on the 460,000 cigarettes found in the unit. The assessment issued to Mr Adams was for excise duty on the 40,000 cigarettes found in his van.

15. Criminal charges were also brought against the Appellants in respect of the incident. On 5 May 2017, Mr Turton and Mr Adams appeared at Sheffield Crown Court, where both pleaded guilty to an offence under s 170(1)(b) CEMA. In his basis of plea dated 2 February 2017, Mr Turton pleaded guilty on the following basis. He was asked by another (who he was not willing to name through fear of repercussions) to visit the unit in order to provide someone who was visiting with four boxes from inside the unit. The person asking him to do this said that they would buy him a "drink" for doing them a favour. When he arrived at the unit there were more than four boxes there. Someone then arrived and he provided him with the boxes agreed. He had no other involvement. He only visited the unit on one occasion. He was to make no financial gain other than the "drink" offered.

16. In an undated letter received by HMRC on 23 March 2018, Mr Turton stated as follows. He had nothing to do with the 460,000 cigarettes found in the warehouse. He was only there doing a favour to someone to pass four boxes on to someone else to pick up. He was not

holding or controlling the boxes at the back of the warehouse. It was the first time that he had been there and he did not know what was in the boxes. In that letter he did not identify the person for whom he says he was doing a favour, and since that letter he has declined to identify that person.

17. Mr Turton and Mr Adams both appealed to the Tribunal against their respective assessments, on 5 June 2018 and 29 January 2019 respectively.

18. On 11 October 2019, the Tribunal directed that these two appeals be heard together.

19. The hearing of these appeals was held on 16 and 17 November 2021. The documents before the Tribunal were the hearing bundle for appeal number TC/2018/04051 (446 pages), the hearing bundle for appeal number TC/2019/00317 (474 pages), an authorities bundle (217 pages), a skeleton argument of HMRC, and the basis of plea of Mr Turton and the basis of plea of Mr Adams in the criminal proceedings before Sheffield Crown Court. Witness evidence was given by HMRC Officers Jones, Searle and Terry. The Appellants did not formally give evidence and were not cross-examined, but the Tribunal has treated their submissions as evidence to the extent that they contained contentions of fact within the Appellants' own knowledge.

20. At the hearing, the Appellants contended that HMRC had not conducted investigations to find those who were really responsible. They noted that HMRC had seen another van outside the unit about half an hour before Mr Adams's van arrived, and that HMRC had not sought to identify the driver or owner of that other van, which might have delivered the cigarettes to the unit. HMRC for their part contended that it was not possible to identify an earlier duty point than Mr Adams for the 40,000 cigarettes found in his van, since it was uncertain whether those cigarettes had been loaded into his van from the unit, or whether cigarettes in the van were in the course of being unloaded into the unit.

21. Both of the Appellants submit that the respective assessments should be wholly set aside. HMRC submit that the Tribunal should dismiss both appeals.

LEGISLATION

22. Sections 1(1)(a) and 2(1) of the Tobacco Products Duty Act 1979 provide that excise duty shall be charged on tobacco products imported into or manufactured in the United Kingdom.

23. Regulation 5 of the 2010 Regulations relevantly provides that there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.

24. Regulation 6(1)(b) of the 2010 Regulations provides that excise goods are released for consumption in the United Kingdom at the time when the goods are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement.

25. Regulation 10(1) of the 2010 Regulations provides that the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) is the person holding the excise goods at that time.

26. Regulation 20(1) of the 2010 Regulations relevantly provides that duty must be paid at or before an excise duty point.

27. Section 170(1)(b) CEMA makes it a criminal offence knowingly to be concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which are chargeable with a duty which has not been paid, with intent to defraud Her Majesty of any duty payable on the goods.

28. Section 12(1) of the Finance Act 1994 empowers HMRC to issue an assessment to a person from whom any amount has become due in respect of any duty of excise.

29. Section 12(4) of the Finance Act 1994 provides that any such assessment must be made by HMRC within 4 years of the time when the liability to the duty arose or within one year from the day on which evidence of facts, sufficient in the opinion of the HMRC to justify the making of the assessment, comes to their knowledge, whichever is the earlier.

30. Sections 13A(2)(b) and 16(1B) of the Finance Act 1994 provide for an appeal to this Tribunal against a decision of HMRC to issue an assessment to excise duty under s 12(1) of that Act. Section 16(5) of that Act provides that the power of the Tribunal in such an appeal includes the power to quash or vary any decision and the power to substitute its own decision for any decision quashed on appeal.

31. Section 16(6) of the Finance Act 1994 provides that subject to certain exceptions that are not relevant in these proceedings, in such an appeal to the Tribunal against an assessment, it is for the appellant to show that the grounds on which any such appeal is brought have been established.

32. Section 154(2)(a) CEMA provides that where in any proceedings relating to customs or excise any question arises as to whether or not any duty has been paid or secured in respect of any goods, then, where those proceedings are brought by or against the Commissioners, the burden of proof shall lie upon the other party to the proceedings.

LEGAL PRINCIPLES

33. For purposes of regulation 10(1) of the 2010 Regulations, a person "holds" goods if the person is in physical possession of the goods. It is irrelevant whether that person has any right to or interest in the goods. It is also irrelevant whether or not that person is or should be aware that the goods are subject to or have become chargeable to excise duty. (See paragraphs 70-77 below.)

34. For purposes of the above provisions of the 2010 Regulations, there can only be one assessment in respect of the same goods, which must be made by reference to a clearly established excise duty point, and there can be only one assessable duty point. However, there cannot be an excise duty point against which an assessment can be made until the facts by which it has occurred can be established. (*Davison and Robinson Ltd v Revenue and Customs* [2018] UKUT 437 (TCC) ("***Davison and Robinson Ltd***") at [76].)

35. HMRC are, as a matter of law and not merely as a matter of HMRC's discretion, obliged to assess against the earliest point in time that they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement. If person A is the holder of duty unpaid goods that have been released for consumption in the United Kingdom, but is able to satisfy HMRC that they acquired the goods from person B who was a previous holder of the goods outside a duty suspension arrangement, then it would not be open to HMRC to assess person A. Rather, HMRC would have to proceed against person B, who in turn might provide evidence that established an even earlier duty point. In such a case, if HMRC were to pursue person A rather than any other person who they are able to establish was a previous holder of the goods, or who caused any other prior event which gave rise to an excise duty point, then it would be open to person A to challenge any assessment made by HMRC through an appeal to this Tribunal. In such an appeal, the Tribunal would have a full merits jurisdiction to consider person A's appeal and to decide whether it accepts person A's evidence that they had acquired the goods in question from the previous holder. If the Tribunal

accepts such evidence, the assessment against person A will have to be discharged. (*Davison and Robinson Ltd* at [79]-[80].)

36. Such an appeal may be allowed by the Tribunal, even if the earlier duty point is established for the first time in the hearing before the Tribunal (see paragraphs 88-91 below).

37. The First-tier Tribunal has no jurisdiction to determine that HMRC have failed to undertake adequate investigations as to the earliest possible duty point that can be established. Even if the Tribunal did have such a jurisdiction, it could at most allow an appeal against an assessment on such grounds only where the appellant first establishes that there is a particular identifiable enquiry that HMRC have not undertaken, which, if undertaken, would very probably establish an earlier duty point and the identity of another person who could be assessed in relation to that earlier duty point. (See paragraphs 78-83 below.)

38. In certain circumstances a court or tribunal may be entitled to draw adverse inferences from the silence in relation to a particular issue of a party who might be expected to have material evidence to give on that issue. Such inferences may go to strengthen the evidence adduced on that issue by the other party, or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to give the material evidence. There must, however, have been some evidence, however weak, adduced by the former on the issue before the Tribunal is entitled to draw an adverse inference against the latter: in other words, there must be a case to answer on that issue. If the reason for the party's silence satisfies the Tribunal, then no such adverse inference may be drawn. If on the other hand there is some credible explanation given, even if it is not wholly satisfactory, the potential detrimental effect of the silence may be reduced or nullified. The principle is not affected by the question whether or not the party from which there is an absence of evidence has the burden of proof. In proceedings before this Tribunal, the application of this principle should be limited to specific matters which were part of the argument before it. It is ultimately for the fact-finding Tribunal to make what it regards as appropriate findings of fact having regard to all the circumstances of the case including the fact, if this is established, that a party has not given a satisfactory explanation for not giving relevant evidence, and the approach in this respect is not rigid and prescriptive. (*Revenue and Customs v CCA Distribution Limited* [2015] UKUT 0513 (TCC) at [65]-[67]; *Safe Cellars Ltd v Revenue and Customs* [2017] UKFTT 78 (TC) at [49]-[54].)

39. Where the Tribunal decides not to draw any adverse inference from a party's decision to withhold material evidence, this does not mean that the Tribunal is required to make assumptions in that party's favour that the evidence withheld, if not withheld, would have provided satisfactory answers to any problematic issues. The Tribunal is always required to make findings of fact on the basis of such evidence as is before it, and the Tribunal is always entitled to draw inferences from that evidence, and to take into account any contradiction or implausibility in that evidence. Drawing an inference *from the evidence that is before the Tribunal* that is adverse to a party's case is not the same thing as drawing an adverse inference *from that party's decision to withhold material evidence from the Tribunal*.

40. Where a person appealing against an assessment to excise duty on certain goods has previously been convicted of an offence under CEMA of being knowingly concerned in a fraudulent attempt at evasion of duty in relation to the same goods, the Tribunal is entitled to consider the conviction of the offence as part of the facts and circumstances of the case. Where the person pleaded guilty to the offence under CEMA, the Tribunal may have regard, for instance, to witness statements and any interview record from the criminal proceedings which show what had happened, and which show exactly what the appellant was accepting by the guilty plea. However, the mere fact of the conviction itself cannot be considered in isolation from the other relevant evidence about the facts which gave rise to it. The Tribunal in the

appeal against the assessment must have regard to what in fact the appellant was convicted of actually doing. (Compare *Munir v Revenue and Customs* [2021] EWCA Civ 799 ("***Munir***") at [28].)

41. The fact that a person has been convicted of an offence under CEMA of being knowingly concerned in a fraudulent attempt at evasion of duty chargeable on goods does not prevent that person from also being assessed to the duty on the goods (*Munir* at [5(i)], [9(i)] and [10]).

FINDINGS OF DISPUTED FACTS

Mr Turton had physical possession of the cigarettes in the unit

42. The Tribunal finds that at the time of the unannounced HMRC visit on 28 October 2015, Mr Turton had physical possession of the 460,000 cigarettes in the unit, within the usual meaning of the term "physical possession" as used in everyday language.

43. The Tribunal is satisfied that in the circumstances described by Mr Turton, the person who gave him the key, and who gave him the task of handing over four boxes to a person who would come to collect them, was thereby in fact entrusting him with the care and control of all of the boxes in the unit, for the time that he was in the unit.

44. The Tribunal is satisfied that at the time of the unannounced HMRC visit, Mr Turton had a key to the unit, and was alone in the unit. Mr Turton does not seek to suggest otherwise, and there is no evidence to the contrary.

45. The Tribunal is satisfied on the evidence that the unmarked white boxes found in the unit took up a considerable amount of the space in the unit, and that they were positioned in a way that they were a dominant feature of the interior of the unit. The evidence of HMRC Officer Jones was that the unit itself was not much bigger than a double lockup garage. He said that the pile of white boxes formed a kind of wall down the middle of the unit. He added that the entrance was at one end of the unit, and that on entering the unit, there was space in front of the pile of boxes as well as space behind the pile of boxes. HMRC Officer Searle said that the boxes took up a large amount of space in the unit, and that the boxes were up to about chest height. He added that the pile of boxes was up against the right-hand wall of the unit, leaving space on the left-hand side of the unit through which it was possible to get around the pile of boxes. To the extent that Mr Turton, by referring to boxes being "at the back of the lockup", seeks to suggest that the presence of the boxes in the unit was unobtrusive or not readily noticeable, the Tribunal does not accept that suggestion.

46. The Tribunal finds that on Mr Turton's own case, he was given the key to the unit by an unnamed person for the express purpose of going to the unit alone in order to give four of the boxes to someone who would be coming to collect them. His basis of plea in the proceedings before Sheffield Crown Court states that he was given the key "in order to provide someone who was visiting with 4 boxes from inside the lock up".

47. Even if it were to be accepted that he did not in fact touch any of the boxes other than the four he was tasked with handing over, during the time that he was alone in the unit it would have been within his power to touch, move, or deal with any of the other boxes, and it would have been him alone who at that time had the immediate physical ability to do so.

48. The person who gave him the key to the unit was thus in practice not only trusting him to hand over four boxes to a person who was going to come to collect them, but was also trusting him to ensure that the person who came to collect those boxes did not take more than four, and was also trusting him not to allow anyone else to take any of the boxes and not to take any of the boxes himself.

49. It is improbable that the person giving Mr Turton the key and the task would do so unless that person was satisfied that Mr Turton would exercise diligence and care in relation to all of the boxes as a whole, and unless that person was also satisfied that Mr Turton himself was aware of the diligence and care that was expected of him. According to the witness statement of HMRC Officer Terry, the retail price of cigarettes such as these would have been around £6.28 for 20, which means that the 460,000 cigarettes would have had a retail value of around £144,440. Furthermore, because the cigarettes were duty unpaid, if their existence at the unit had become known to anyone else, there was a risk that they would have been seized and forfeited, and that persons other than Mr Turton might potentially be exposed to criminal liability. Even if the boxes were closed and unmarked, there would have been a risk that Mr Turton, if unaware of the importance of exercising care and confidentiality, might have opened one of the boxes or allowed one of the boxes to be opened by the person coming to collect them, in order to check what was inside, and that he would have spoken openly to others afterwards about what was seen inside the boxes. Given the number of boxes in the unit, the amount of space that they took up, and the fact that they were in very obvious plain sight in the middle of the unit, these risks would have been real and immediate.

50. The Tribunal is satisfied that Mr Turton must have had a prior relationship with the person who gave him the key and the task. Mr Turton claims that he accepted the task of going to the unit to arrange the handing over of the four boxes in return for "a drink" (according to his February 2017 basis of plea) or "a few drinks" (according to his December 2018 witness statement). The fact that he undertook such a task as a "favour" (February 2017 basis of plea) in return for a drink or few drinks is indicative of a prior relationship. For the reasons already given, the Tribunal finds it improbable that Mr Turton would have been given this task in the absence of a prior relationship of a kind sufficient to establish the requisite degree of trust and confidence in Mr Turton on the part of the person for whom he carried out this task.

51. The Tribunal is furthermore satisfied on a balance of probability that Mr Turton was aware at the time that person giving him the key and the task was involved in the handling of duty unpaid cigarettes.

52. It is apparent that Mr Turton would rather risk losing this appeal than disclose the details of this person. Mr Turton has consistently claimed that he is unwilling to do so due to fear of repercussions. If this were true, given that the assessment is for such a very large sum, Mr Turton's level of fear would have to be very great indeed. If this person did pose such a threat to those acting contrary to his interests as Mr Turton appears to think he does, it is improbable that Mr Turton only became aware after the cigarettes were seized that this was the case. The fact that Mr Turton, prior to the seizure, was nevertheless prepared to maintain with this person a relationship involving a level of trust and confidence, and to do him a favour of this kind in return for a few drinks, would make it probable that Mr Turton previously had some idea of the main kinds of activities that this person was involved in. Given the value of the cigarettes found in the unit, it is likely that involvement in the handling of duty unpaid cigarettes was a significant activity of this person.

53. Based on the above, the Tribunal also finds it more likely than not that while he was at the unit, Mr Turton was aware that the boxes contained duty unpaid cigarettes.

54. The Tribunal has come to the conclusions above without reaching the stage of having to consider whether or not any adverse inference should be drawn against Mr Turton as a result of his decision not to identify the person who he says gave him the key and the task (compare paragraphs 38-39 above).

55. The Tribunal has taken into account the factual statements made by Mr Turton in his basis of plea in the Sheffield Crown Court proceedings, but has otherwise come to the

conclusions above without taking into account the fact of Mr Turton's conviction of the criminal offence under CEMA to which he pleaded guilty. There is insufficient evidence before the Tribunal about the criminal proceedings to enable the Tribunal to be satisfied that the guilty plea itself is probative of any disputed issue in this appeal (compare paragraph 40 above).

56. The Tribunal accepts that the mere fact that a person has the keys to premises, and is alone inside those premises, may be insufficient to conclude that the person is in physical possession of all of the contents of those premises. The Tribunal similarly accepts that the mere fact that a person is physically proximate to goods may be insufficient to conclude that the person is in physical possession of those goods. The conclusion in this case that Mr Turton had physical possession of all of the boxes in the unit and their contents is not based on either of those considerations alone, but is based on all of the above circumstances considered as a whole.

The cigarettes in the van had been obtained by Mr Adams from Mr Turton

57. The Tribunal finds that the four boxes of cigarettes found in Mr Adams's van had, immediately before the unannounced HMRC visit, formed part of the stock of boxes inside the unit that were in the physical possession of Mr Turton, and that Mr Turton had supplied these boxes to Mr Adams.

58. The evidence of HMRC Officer Jones is that the four boxes in the van were identical to the boxes of cigarettes found in the unit. The van was backed up to an open door of the unit. In the circumstances it is significantly more likely than not that either the boxes in the van had just been loaded into the van from the stock of boxes in the unit, or that the boxes in the unit had just been unloaded from the van.

59. On the very day of the HMRC unannounced visit, Mr Adams said in his interview under caution that he had driven his van to the unit to collect five boxes from there, and that he had obtained the four boxes in the van from Mr Turton in the unit. Mr Adams has consistently maintained this since.

60. In the proceedings before Sheffield Crown Court, the basis of plea of Mr Adams (dated December 2016) and the basis of plea of Mr Turton (dated February 2017) both maintained that the four boxes in Mr Adams's van had been obtained by Mr Adams from Mr Turton. Mr Tuton has also maintained this consistently since.

61. The Tribunal takes into account that both Appellants pleaded guilty to criminal offences involving fraudulent conduct in relation to the incident, and that neither Appellant subjected themselves to cross-examination in the hearing of the present appeals, which are matters potentially relevant to the weight to be given to their evidence. However, the claim that the boxes in the van were obtained by Mr Adams from Mr Turton is plausible and not inconsistent with any other evidence. Furthermore, there is no evidence before the Tribunal to suggest positively that anything other than this occurred. No reason has been advanced as to why it would have been self-serving for both Mr Turton and Mr Adams to contend, at the time that they each first so contended, that Mr Adams obtained the boxes from Mr Turton, rather than that Mr Adams was supplying boxes to Mr Turton.

62. The Tribunal does not accept the argument advanced by HMRC at the hearing that it is not possible to determine whether the four boxes in the van were obtained by Mr Adams from Mr Turton, or had been brought in the van by Mr Adams to the unit for delivery to Mr Turton. It may be true that it is not possible to determine this with certainty. However, the Tribunal makes findings of fact not on the basis of certainty, but on the basis of the balance of

probability. The Tribunal finds on the evidence as a whole that the facts in paragraph 57 above are established on a balance of probability.

No earlier duty point than Mr Turton can be established

63. The Tribunal finds that HMRC have undertaken investigations with a view to determining whether any earlier duty point can be established than the time of the 28 October 2015 visit.

64. The Tribunal further finds that it has not been established that there are any further lines of enquiry which, had they been pursued, would very probably have established an earlier duty point as well as the identity of another person who could be assessed in relation to that earlier duty point.

65. Mr Turton has provided no evidence to establish the identity of any other person who was a holder of the goods outside a duty suspension arrangement prior to the HMRC unannounced visit on 28 October 2015. Indeed, Mr Turton has declined to disclose the identity of the person who he says tasked him with going to the unit on that day, saying that he fears repercussions if he were to do so.

66. The evidence of HMRC Officer Terry is that HMRC undertook land registry checks to identify the owner of the business unit facility, and that HMRC then contacted that owner to ascertain who had rented the unit to which this appeal relates. Officer Terry further states that the owner of the facility refused to give a witness statement but disclosed the name of the third party renting the unit at the time of the seizure, that HMRC completed police checks on that third party, and that based on those police checks HMRC decided not to approach the third party for a statement as they believed that it would be unlikely that the third party would cooperate and further believed that the third party could not be deemed to be a witness of truth.

67. There is nothing in the evidence or the arguments presented at the hearing that would cast doubt on the reasonableness of that conclusion of HMRC.

68. The evidence of HMRC Officer Searle is that on the day of the HMRC visit, a different van had also been seen backed up to the doors of the unit about half an hour before the visit, and that he had taken note of the registration number of that other van. In oral evidence, Officer Searle said that it was not possible to see what that other van was doing at the time. However, he confirmed that from what he could see, it was possible that goods were being unloaded from that van into the unit, or were being loaded into the van from the unit. There is no information before the Tribunal that HMRC ever made any enquiries as to the person to whose name that vehicle was registered, with a view to obtaining further leads relevant to establishing an earlier duty point. There is also no information before the Tribunal that HMRC ever made a positive decision not to pursue such enquiries, or if so, what its reasons were for deciding not to do so.

69. However, there is also no information or evidence before the Tribunal on the basis of which it could be concluded that such an enquiry, if pursued, would very probably have established an earlier duty point and the identity of another person who could be assessed in relation to that earlier duty point. While there is a theoretical possibility that such an enquiry could have done so, there is nothing before the Tribunal to suggest that this was anything more than a theoretical possibility. For instance, no basis has been established to suggest that the involvement of the driver of the earlier van might have been any different to that of Mr Adams, who similarly reversed a van to the doors of the unit approximately half an hour later. The Tribunal does not accept the contention of the Appellants that this was such an obvious line of enquiry that HMRC's failure to pursue it was inherently blameworthy.

FINDINGS OF DISPUTED POINTS OF LAW

"Holding" in regulation 10 of the 2010 Regulations means physical possession

70. The Tribunal finds that for purposes of regulation 10(1) of the 2010 Regulations, a person "holds" goods if the person is in physical possession of the goods, within the usual meaning of the expression "physical possession" as used in everyday language. It is irrelevant whether that person has any right to or interest in the goods. It is also irrelevant whether or not that person is aware or should reasonably be aware that the goods are subject to excise duty, or that they have become chargeable to any excise duty to which they are subject.

71. The 2010 Regulations implement Council Directive 2008/118/EC of 16 December 2008 (the "**2008 Directive**"). The words "hold", "holding" and "held" in provisions of the 2010 Regulations have the same meaning as they do in the provisions of the 2008 Directive that they implement.

72. The words "hold", "holding" and "held", in relation to excise goods, have the same meaning throughout the various different provisions of the 2008 Directive in which they are used (*Dawson's (Wales) Ltd v Revenue and Customs* [2019] UKUT 296 (TCC) ("***Dawson's (Wales) Ltd***") at [144]), and they therefore also have that same meaning throughout the various provisions of the 2010 Regulations in which they are used.

73. In Case C-279/19, *Commissioners for Her Majesty's Revenue and Customs v WR*, ECLI:EU:C:2021:473 ("***WR***") at [24]-[25], the Court of Justice of the European Union ("**CJEU**") held that the expressions "holding" and "held" in Article 33(1) of the 2008 Directive have the meaning set out in in paragraph 70 above (*WR* at especially [36]).

74. In particular, the CJEU held that the meaning and scope of the words "hold", "holding" and "held" in this context are autonomous and uniform throughout the European Union, and are determined according to the usual meaning of those terms in everyday language. The meaning is therefore not to be ascertained by reference to particular legal concepts in the legal system of any one country, such as the concept of possession in English law. (*WR* at [23].)

75. *WR* is a judgment of the CJEU handed down after the end of the transition period, on a reference for a preliminary ruling made by a United Kingdom court prior to the date on which the United Kingdom left the European Union, and prior to the end of the transition period (the reference having been made by the Court of Appeal in *Revenue and Customs v Perfect* [2019] EWCA Civ 465). Notwithstanding s 6(1)(a) of the European Union (Withdrawal) Act 2018, the judgment of the CJEU in *WR* therefore has binding force in its entirety on and in the United Kingdom, pursuant to Articles 86(2) and 89(1) of the EU-UK Withdrawal Agreement and s 7A of that Act.

76. The Tribunal must therefore interpret the expressions "hold", "holding" and "held" in the 2010 Regulations consistently with the judgment in *WR*, rather than in accordance with earlier case law of United Kingdom courts and tribunals, such as *Dawson's (Wales) Ltd* at [131(3)] (to the effect that an innocent agent having physical possession of goods is not to be regarded as holding those goods).

77. According to the definition in *WR*, a person can be "holding" duty unpaid cigarettes for purposes of the 2008 Directive and the 2010 Regulations, both in circumstances (1) where the person knows that the goods they are holding are cigarettes or unspecified excise goods but does not know that they have become chargeable to any excise duty or that the excise duty has not been paid, and (2) where the person does not even know that the goods they are holding are cigarettes or unspecified excise goods. This is evident from the questions on which the Court of Appeal of England and Wales requested a preliminary ruling, and the wording of the

preliminary ruling given by the CJEU. The Court of Appeal asked whether a person could be liable to excise duty in circumstances where that person "knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty … at or prior to the time that they became so chargeable". The Court of Appeal then asked whether the answer to this question would be any different if the person did not know "that the goods he was in possession of were excise goods". (See *WR* at [20]). The CJEU answered these questions by stating that the person could be liable to excise duty both (1) where the person was "not aware that [the goods] are subject to excise duty", and (2) where the person was aware that the goods are subject to excise duty but was "not aware that they have become chargeable to the corresponding excise duty".

The burden is on an appellant to establish any earlier duty point

78. The Tribunal finds that in an appeal to this Tribunal against an assessment to excise duty, if the appellant contends that the assessment should be discharged on the ground that an earlier duty point can be established prior to the time at which the appellant became the holder of the goods, the burden is on the appellant to establish by evidence the existence of an earlier duty point and the identity of the person who is liable to be assessed to duty at that earlier duty point.

79. This follows from the legal principles referred to in paragraph 35 above.

80. To the extent that the Appellants suggest that in a Tribunal appeal against an assessment to excise duty, the burden is on HMRC to prove that it is not possible for them to establish an earlier duty point, the Tribunal rejects that suggestion. In particular, the Tribunal rejects any suggestion that there is a general burden on HMRC in an appeal against an assessment to prove that they have exhausted all reasonable enquiries to establish the earliest possible duty point.

81. It is unnecessary for the Tribunal to determine whether HMRC may be under any kind of public law duty to undertake adequate investigations to establish the earliest possible duty point. Even if this were so, the remedy for any breach of such a public law duty would lie in judicial review proceedings brought in the appropriate court. In an appeal to this Tribunal against an assessment, the assessment itself cannot be challenged on grounds of a claimed breach of such a public law duty.

82. In any event, even if this Tribunal did have the power to overturn an assessment on the ground that HMRC have undertaken inadequate investigation with a view to establishing the earliest possible duty point, such a power could at most be exercised in circumstances where the appellant has first established that there is a particular identifiable enquiry that HMRC have not undertaken, which, if undertaken, would very probably establish an earlier duty point and the identity of another person who could be assessed in relation to that earlier duty point. The Tribunal could not be empowered or required to review generally the adequacy or lawfulness of HMRC's investigations. To do this, the Tribunal would need to review the whole of the HMRC investigations file and the whole of the course of HMRC's conduct of the investigation, which would take it far beyond the limits of its statutory jurisdiction of hearing appeals against assessments.

83. The burden of proof is on the appellant to show that an assessment is wrong (see paragraphs 31-32 above). It cannot be enough to succeed in an appeal against an assessment for an appellant to point to particular enquiries that HMRC might potentially have undertaken but have not.

REASONS FOR DECISION

Appeal number TC/2018/04051 (Turton)

84. The Tribunal is satisfied that at the time of the HMRC visit on 28 October 2015, there were 460,000 duty unpaid cigarettes in the unit, and that these were outside a duty suspension arrangement, such that they had been released for consumption in the United Kingdom. Mr Turton has not sought to contend otherwise.

85. At the time of the HMRC visit, Mr Turton was in physical possession of the 460,000 cigarettes in the unit (paragraphs 42-56 above). He was accordingly the holder of those cigarettes for purposes of the 2010 Regulations (paragraphs 70-77 above). No earlier duty point for those cigarettes has been established (paragraphs 63-69 and 78-83 above). Pursuant to paragraph 10(1) of the 2010 Regulations (paragraph 25 above), Mr Turton is accordingly liable to pay the excise duty. It is immaterial whether or not Mr Turton was aware that the boxes in his possession contained duty unpaid cigarettes, but the Tribunal has in any event found above that he was (see especially paragraphs 50-53 above).

86. Mr Turton has not sought to dispute the quantum of the assessment.

87. In his letter received by HMRC on 23 March 2018, Mr Turton argued that there is no way that he could afford to pay the assessment, that the matter is putting a strain on his marriage, that he is suffering from health issues, and that he cannot afford a solicitor to represent him in these matters. None of these matters are grounds for allowing an appeal against an assessment.

Appeal number TC/2019/00317 (Adams)

88. Immediately prior to the HMRC visit on 28 October 2015, the 40,000 cigarettes in Mr Adams's van had been obtained by him from Mr Turton from the stock of boxes inside the unit (paragraphs 57-62 above). It is therefore established that Mr Turton was a prior holder of the cigarettes found in Mr Adams's van. It follows that Mr Turton rather than Mr Adams should have been assessed for the duty on these cigarettes (paragraphs 34-36 above).

89. The Tribunal appreciates that this conclusion presents some practical difficulties for HMRC. The decision of HMRC, to assess Mr Turton to the duty on the cigarettes found in the unit, and to assess Mr Adams to the duty on the cigarettes found in the van, was taken by HMRC on 19 October 2016 on the basis of the information then available to them. The decision of the Tribunal that Mr Turton rather than Mr Adams should have been assessed to the duty on the cigarettes in the van is taken by the Tribunal on the basis of the evidence available to it at the time of the hearing of this appeal, which included evidence not available to HMRC at the time of their decision. The additional evidence available to the Tribunal includes the basis of plea of Mr Turton and Mr Adams in the proceedings before Sheffield Crown Court, and the letter of Mr Turton received by HMRC on 23 March 2018, as well as the Appellants' various submissions in these appeals.

90. Although the Tribunal has found that Mr Turton should have been assessed for the cigarettes in the van, the Tribunal itself cannot find that Mr Turton is liable to the excise on those 40,000 cigarettes. This is so, notwithstanding that these appeals were heard together, and that the Tribunal has the power referred to in the second sentence of paragraph 30 above. It is for HMRC and not the Tribunal to issue assessments. However, HMRC are now out of time to issue any assessment in relation to those 40,000 cigarettes to Mr Turton (see paragraph 29 above). Thus, it now appears that no assessment will ever be issued to either of these Appellants for the 40,000 cigarettes found in the van.

91. Nevertheless, it is the law that an assessment will be overturned by the Tribunal on appeal if an earlier duty point can be established (paragraph 35 above). The Tribunal finds that this principle applies even if the earlier duty point is established for the first time in the appeal proceedings before the Tribunal. At the hearing of these appeals, it was expressly accepted on behalf of HMRC that if the Tribunal were to find as a fact that Mr Adams obtained the cigarettes in the van from Mr Turton, then Mr Adams's appeal would succeed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

Release date: 26 NOVEMEBR 2021