UT Neutral citation number: **[2024] UKUT 34 (TCC)**

UT (Tax & Chancery) Case Number: UT/2018/000005

Upper Tribunal
(Tax and Chancery Chamber)

The Royal Courts of Justice, Rolls Building, London

EXCISE DUTIES – whether the FTT erred in treating an employer as "holding" excise goods for the purpose of Reg. 13(2)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 in circumstances where the goods were in the physical possession of its employee acting in the course of his employment – no – appeal dismissed

Heard on 13 June 2023
Judgment given on: 01 February 2024

Before

MR JUSTICE JOHNSON
JUDGE VIMAL TILAKAPALA

Between

AGNIEZSKA HARTLEB T/A HARTLEB TRANSPORT

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Christina Nicholas of Counsel

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

DECISION

INTRODUCTION

1. This is an appeal by the Appellant Agnieszka Hartleb t/a Hartleb Transport from a decision of the First-tier Tribunal (the "FTT" and the "Decision") dated 4 September 2018 which confirmed an excise duty assessment in the sum of £130,913 together with an associated penalty of £26,689. The Respondents are the Commissioners for His Majesty's Revenue and Customs ("HMRC").

2. The Appellant runs a transport business in Poland providing two lorries and a driver for transporting goods.

3. One of the Appellant's drivers was stopped at Dover where Border Force discovered in his lorry three pallets of cigarettes for which there was no evidence that duty had ever been paid. The lorry and cigarettes were seized and as the legality of the seizure was not challenged in condemnation proceedings in the Magistrates' court, both the cigarettes and lorry were condemned as forfeit although the authorities agreed to restore the lorry to the Appellant in return for a fee.

4. The procedural history of the appeal is complex.

5. The Appellant sought on 5 June 2018 permission to appeal to the Upper Tribunal (the "UT") on eight grounds. These grounds were all dismissed by the FTT as it found that six of the grounds disputed inferences made by the FTT from facts but failed to give reasons as to why there were any errors in law, and two of the grounds appeared to be mistaken.

6. On 1 October 2018, the Appellant made a renewed application to the UT for permission to appeal. The UT Judge (Judge Jonathan Richards, as he was then) considered that some of the grounds of appeal related to the way in which the FTT had applied the law to the facts rather than the inferences made by the FTT. He noted that several of the grounds involved arguments that involved the attribution of knowledge to the Appellant and that similar issues had been raised but not answered fully by the UT in *Perfect v HMRC* [2017] UKUT 467 (TCC). Given the relative lack of authority at the time on what amounted to constructive knowledge, Permission to Appeal was granted on the following single ground:

> "The First Tier Tribunal erred in law in concluding, from the primary facts that it found, that Ms Hartleb had sufficient constructive knowledge of the criminal enterprise in relation to the excise goods so as to be liable to the duty assessed under Regulation 13(2)(a) or Regulation 13(2)(b) of the Excise Goods (Holding Movement and Duty Point) Regulations 2010"

7. Before the date of that appeal, *Perfect* had been heard by the Court of Appeal and an application made by Mr Perfect to the CJEU for determination of whether a person in possession of excise goods required actual or constructive knowledge of excise duty on those goods being unpaid in order to be liable for that duty pursuant to Article 33(2) of Directive 2008/118/EC (this is addressed in more detail in our discussion below).

8. As the outcome of the CJEU determination was so relevant to the issues in the Appellant's appeal, it was decided by the UT on 11 December 2019 that the appeal would be stayed until after the Court of Appeal's determination following the CJEU's response.

9. The CJEU's determination of the question raised in *Perfect* was handed down in *HM Revenue & Commissioners v WR* (C-279/19) on 10 June 2021. The stay imposed expired 28 days later. Given the material impact of the CJEU's determination on the Appellant's ground of appeal, HMRC asked on 8 July 2021 for confirmation of whether the Appellant intended to

continue with the appeal, outlining that, in their view, it had no reasonable prospect of success following the CJEU's determination.

10. As no response was received from the Appellant, an Unless Order was issued by the UT on 14 September 2021. The Appeal was consequently struck out on 22 September 2021 under the powers in rule 8(3)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") and on application by HMRC for costs pursuant to Rule 10(1)(a), a Costs Direction was made on 8 November 2021 awarding costs to HMRC.

11. In February 2022 the Appeal was reinstated by the UT (Judge Rupert Jones) as it was accepted that the Appellant's representative had not received the strike out direction, costs decision or any of the surrounding correspondence from the UT or HMRC. The Costs Direction was also set aside.

12. The Appellant was also granted permission to amend her grounds of appeal following the decision in *WR*. The UT agreed that the CJEU decision in *WR* meant that the original ground of appeal on which the Appellant had been granted permission had no reasonable prospect of success.

13. Permission was given to appeal on two new grounds both of which the UT considered just and fair to permit in light of the CJEU decision in *WR* on the basis that there were significant points of law that might have wider implications and an absence of authority on them. The new grounds were:

> (1) Whether the FTT erred in law in concluding that the Appellant was the person holding the goods for the purposes of Regulation 13(2)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 despite not having physical possession of them (Ground 1).
>
> (2) Whether the FTT erred in law in concluding, in the alternative, that the Appellant was the person making the delivery of the goods for the purposes of Regulation 13(2)(a) of the Regulations despite not having physical possession of them (Ground 2).

14. On 28 March 2023 the Court of Appeal decision in *Dawson's (Wales) Ltd v HMRC* [2023] EWCA Civ 332 ("Dawson") was released. As the case was of relevance to the matters being appealed, the UT (at the instruction of Judge Rupert Jones) contacted the parties to inform them that their appeal would need to consider the consequences of *Dawson* and that the Appellant might want to amend or add grounds of appeal. The UT set out six specific issues that might need particular consideration. The Appellant was invited to seek permission for amending or adding additional grounds to her appeal within 21 days of that message. The six grounds for consideration suggested by the UT were:

> (1) Whether the FTT erred in finding that the Appellant held the goods on the basis that she was in de facto and/or legal control of the goods.
>
> (2) Whether a finding that a person holds goods for the purposes of the Regulations as well as requiring control of goods also requires a state of knowledge that the goods have been released for consumption in the UK – whether a finding of actual or constructive knowledge is a necessary requirement of the determination that they are holding goods.
>
> (3) Whether the FTT erred in finding that the Appellant had constructive knowledge that the load on her lorry included smuggled cigarettes (that the goods were being imported into the UK without excise duty being paid and they were to be held for a commercial purpose in the UK).
>
> (4) Whether the FTT erred in its alternative finding that the Appellant was making delivery of the goods.

(5) Whether the FTT erred in not considering whether an earlier excise duty point could be established against which the assessment should have been made and not determining that the assessment should have been made against someone other than the Appellant.

(6) Whether the FTT's findings on the Appellant's control, knowledge, holding or delivering goods means that it erred in determining the penalty in this case.

15. The Appellant applied accordingly on 13 April 2023 to amend her grounds of appeal with amended grounds set out in a document headed "Appellant's Amended Grounds of Appeal". However, the appeal documents provided minimal detail and did not explain whether the six additional grounds for consideration suggested by the UT were to be pursued or why. Instead the documents largely repeated the additional areas for consideration as suggested by the UT.

16. The Respondents opposed the Appellant's application on the basis that she had failed to articulate with clarity what amendments were proposed to her existing Grounds of Appeal or the basis for her Amended Grounds of Appeal. The Respondents accordingly asked the UT on 28 April 2023 to dismiss the Appellant's application to amend the grounds of appeal.

17. On 1 May 2023, in response to HMRC's application, the Appellant's representative submitted a document to the UT headed "Application to Allow Late Answers to Questions". In this document she provided what were described as answers relating to the judgment in *Dawson*. In the same document she applied to add as additional grounds of appeal the six grounds suggested by the Tribunal, providing brief comments on each described as "Short answers to questions". The details contained in the Appellant's further application were, however, slight and did not consider the issue of permission to appeal nor did the application explain why the Appellant considered that the FTT decision was wrongly decided by reference to *Dawson*.

18. The UT (Judge Rupert Jones) accepted the basis of the Respondents' objection but considered that permission to appeal on the six additional grounds proposed by the Appellant could be considered as part of the substantive hearing and that the Respondent would have the opportunity at the hearing to object to permission being granted when replying. This was on the basis that the additional grounds were related to the grounds for which the Appellant had permission to appeal and that *Dawson* would in any event need to be considered at the hearing.

19. Judge Jones stated that by giving permission to pursue additional or amended grounds he was not granting permission to appeal on any of those grounds. He set a date well in advance of the hearing for skeleton arguments to be provided and made it clear to the Appellant that there would be serious sanctions for non-compliance with the UT's directions and that the Appellant would not be permitted to pursue any ground of appeal or argument not fully set out in writing in its skeleton argument. The directions which set out the six grounds on which permission to appeal could be sought were issued on 2 May 2023.

20. Notwithstanding the deadline contained in the 2 May 2023 directions, the Appellant's skeleton was submitted a day late and does not clearly lay out the basis on which she seeks to amend or add to her grounds of appeal.

21. This hearing is therefore a rolled-up hearing to hear the grounds of appeal on which the Appellant has been given permission to appeal and to also determine whether to give the Appellant permission to add the additional six grounds of appeal and hear the substantive appeal if permission is so given.

The Relevant Legislation

22. Directive 2008/118/EC (the "Excise Directive") lays down general arrangements for excise duty, which seek to harmonise the principles to be applied across the EU as regards the

point at which excise duty should be levied in excise goods and the identity of the person liable. Section 2 provides, so far as relevant, as follows:

> Section 2
>
> Holding in another Member State
>
> Article 33 (Excise goods already released for consumption in one Member State)
>
> 1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
>   For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.
>
> 4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.

23. The Finance (No.2 Act) 1992 ("the 1992 Act") contains the authority for the making of regulations to implement the provisions of the Excise Directive concerning the chargeability of goods to excise duty in the UK and the persons liable to pay it.

24. The Excise Goods (Holding, Movement and Duty Point) Regulations (SI 2010/593) (the "HMDP Regulations") are the relevant regulations made pursuant to the powers contained in the 1992 Act currently in force and which implement the provisions of the Excise Directive into UK law. They provide so far as relevant:

> 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 UK 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."

13. –

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

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

(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

25. It is common ground that the terms of the Excise Directive and the HMDP Regulations must be interpreted consistently.

Preliminary issues

What are the grounds of appeal?

26. The Appellant's skeleton argument does not set out with any clarity her grounds of appeal. As pointed out by HMRC it conflates areas on which permission to appeal has been granted with those areas where permission to appeal is sought. It also strays into areas where permission to appeal has been expressly denied. It is, unfortunately, a confusing document and the lack of a structured approach makes it difficult to deal with.

27. We note also the express warning given by this Tribunal on 2 May 2023 that if the Appellant failed to clearly set out her grounds of appeal in her skeleton argument they would not be considered by the tribunal.

28. However, notwithstanding the lack of clarity and the warning to the Appellant to clearly set out her case in her skeleton argument, we have decided that it is in the interests of justice to consider the additional grounds on which permission to appeal is sought, as set out in the 2 May 2023 directions (we refer to these as the "PTA Grounds") in addition to hearing the two grounds of appeal on which permission to appeal has been given (we refer to these as the "Grounds of Appeal").

29. In reaching our decision on what to consider, we have taken into account the potential prejudice to the Appellant in not considering the PTA Grounds given the significant excise duty assessment of over £130,000 as well as the potential prejudice to HMRC caused by the Appellant's lack of clarity and delay. Our decision is a finely balanced one, influenced ultimately by the fact that most of the issues raised in the six additional questions suggested by this Tribunal and reflected in the PTA Grounds are linked inextricably with the Grounds of Appeal and so would be considered anyway as there is a material degree of overlap.

30. We deal first with the Grounds of Appeal before turning to the PTA Grounds.

THE GROUNDS OF APPEAL

31. These are:

(1) Whether the FT erred in law in concluding that the Appellant was the person "holding the goods" for the purposes of Reg. 13(2)(b) of the HMDP Regulations despite not having physical possession of them ("Ground 1").

(2) Whether the FTT erred in law in concluding, in the alternative, that the Appellant was the "person making the delivery of the goods" for the purposes of Reg.13(2)(a) of the HMDP Regulations despite not having physical possession of them ("Ground 2").

32. To answer these questions, the UT indicated in its permission to appeal decision of 29 October 2018 that it would need to consider the following two sub issues:

(1) Whether carelessness was sufficient to support a finding of constructive knowledge as a matter of law, and

(2) Whether the FTT was wrong to find that the Appellant's employee's knowledge should be attributed to it if he was acting outside the course of his employment when transporting the cigarettes.

Ground 1

The Appellant's submissions

33. Ms Nicholas' argument for the Appellant on Ground 1 is that the Appellant should not be regarded as holding the excise goods for the purposes of Reg. 13(2)(b) as she did not have physical possession of them, such possession instead being with her employee Mr Myslinski. This is notwithstanding the fact that the Appellant had *de facto* and legal control of the excise goods.

34. Ms Nicholas contends that legal and/or *de facto* control of goods, in circumstances where there has never been physical possession of them, is insufficient to amount the "holding" of those goods for the purpose of Reg.13(2)(b). In her view, physical possession is an "indispensable requirement" that must be shown *in addition* to de facto and/or legal control.

35. In support of her contention, Ms Nicholas referred us to the decision of the CJEU in *C-279/19 HMRC v WR* [2021] at [36] (our italics)

> "In the light of the foregoing, the answer to the question referred is that Article 33(3) of Council Directive 2009/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, *and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty,* under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty"

36. This determination was acknowledged subsequently by Newey LJ in the Court of Appeal decision in *Revenue and Customs Commissioners v Perfect* [2022] EWCA Civ 330 at [22] in which the CJEU interpretation in *WR* was applied.

37. Ms Nicholas placed weight also on the fact that in *WR*, the person found liable to the duty was the haulier who was the person in physical possession of the relevant excise goods.

HMRC's submissions

38. Mr Carey, for HMRC, focused on the fact that when interpreting the HMDP Regulations and the Excise Directive the relevant terms must be considered in their context.

39. He saw the starting point as being that the Excise Directive should not be used for fraud, evasion or abuse and so must be construed in such a way as to prevent an interpretation which would permit such aims to be defeated.

40. He cited *Axel Kittel* C-439/04, a Belgian case concerning a supply of goods which took place under a contract which under Belgian law was void due to fraud. In that case the CJEU held, on a reference for a preliminary ruling, that in order to preserve the principle of neutrality in the common VAT system, traders who took every precaution to ensure that their transactions

were not connected with fraud should be able to rely on the legality of those transactions without losing the right to deduct input VAT even where those transactions were void under domestic law. This required the relevant provisions of the Sixth Directive to be interpreted as meaning that it precludes a rule of national law which causes the taxable person to lose the right to deduct VAT paid on the goods.

41. He referred also to what he saw as similar sentiments explored by the Court of Appeal in the first *Perfect* case [2020] STC 705 when considering the purpose of the Excise Directive.

42. He explained how the provisions of the Excise Directive are designed to cast wide the net of participants who might be liable to excise duty. This is because to do otherwise would risk frustrating its purpose, leaving the excise duty system exposed to fraud, evasion or abuse.

43. He cited the following paragraphs of the CJEU decision in *WR*;

> "In that regard, as the Advocate General observed in point 29 of his Opinion, the intention of the EU legislature was to lay down a broad definition, in Article 33(3) of Directive 2008/118 of the category of persons liable to pay excise duty in the event of a movement of excise goods already 'released for consumption' in another Member State in order to be delivered or used there, so as to ensure so far as possible, that such duty is collected." [33]
>
> "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 5 April 2001, van de Water, C-325/99, EU:C:2001:201, paragraphs 39 and 41)." [31]

44. Mr Carey also made much of the potential consequences of an employer being able to escape liability on the basis that excise goods on which duty had not been paid were in the physical possession of its employee, in circumstances where the employee was acting in the course of their employment. Such a possibility would, he pointed out, shield employers from liability in many cases. In addition, the recoverability of excise duty, particularly in large cases, could suffer if tax authorities were unable to pursue employers who might be more likely than their employees to have deep pockets.

45. Mr Carey also asked us to consider the position if the categories of participant liable to the charge for holding were limited to persons physically holding the goods. If this was the case, it would be tantamount in his view to a position where the charge to excise duty might exist only where someone was caught red-handed with goods irregularly held which cannot be the purpose behind the Excise Directive.

46. He argued that, on this basis, when considering the statutory wording of the Excise Directive and HMPD Regulations, "holding" must be give an interpretation such that it (i) prevents fraud, evasion and abuse of the excise duty system, and (ii) enables the net of chargeable persons to be cast wide so as to ensure the correct payment of taxes.

Discussion

47. The issue for us to determine is whether the Appellant is to be regarded as "holding" the excise goods for the purpose of Reg.13(2)(b) in circumstances where:

(1) she is in *de facto* and legal control of the excise goods; and

(2) the excise goods were at the time of seizure in the physical possession of her employee.

48. Ms Nicholas sought to argue as part of her submission that the Appellant's employee was not acting in the course of his employment or under Ms Hartleb's instruction and that he was acting in bad faith. We must, however, disregard this part of her argument as it is contrary to the clear finding of fact by the FTT.

49. As the FTT found:

> "Taking all this into account, I do not find that Ms Hartleb has made out her case of bad faith on the part of her ex-driver. I find he was not knowingly involved in the smuggling nor in collusion with Mr Drodz. I find that with this load, just as with the earlier three loads, he was acting in the course of his employment by Ms Hartleb when he transported it to the UK." [49]

50. We proceed therefore on the basis that the Appellant's employee was acting in the course of his employment and under her direction.

Interpretation in context

51. There is no definition of "holding" in the Excise Directive or the HMDP Regulations. As Parker J observed in *Taylor v Wood* [2013] EWCA Crim 1151:

> " 'Holding' is not defined in the Finance Act or in the Regulations, there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods." [29].

52. We agree with Mr Carey that the term and the HMDP Regulations generally must be interpreted in the context of the Excise Directive and its objectives.

53. The need to interpret EU legislation in context is a long-standing principle of EU law. Asplin LJ in *Dawson* confirmed this specifically in relation to the meaning of "holding" when commenting on the earlier decision in *Taylor and Wood*:

> "The court approached the question of "holding" at paras 29-30 solely from the perspective of domestic law. The concept of "holding" arises, however, in the Excise Directive (and the 1992 Directive before it) and is a principle of EU law which must be approached through that lens. As the UT pointed out at paras 93-94 of its decision, it is a well established principle that when interpreting a provision of EU law, it is necessary to consider not only the wording of the provision but its context and aims and that a term such as "holding" should have an autonomous meaning; *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03) EU:C:2005:322; [2005] STC 1547. Legislation implementing a provision of EU law must then be interpreted, so far as possible, in conformity with EU law, thus interpreted. That was not the approach which the Court of Appeal Criminal Division adopted" [68]

54. Asplin LJ went on to state that:

> "As the Advocate General pointed out in the *Perfect* case, the meaning and scope of terms for which EU legislation does not provide a definition must be determined by reference to their usual meaning in everyday language whilst taking into account their context and the purpose of the rules in question. Furthermore there can be no doubt that "holding" must be given a consistent meaning in all Member States and throughout the Excise Directive. Nothing turns therefore upon the point that the *Perfect* case was concerned with the meaning of "holding" for the purposes of article 33 rather than article 7(2)(b). There is also no question but that the HMDP Regulations must be interpreted in conformity with the Excise Directive." [78]

55. It is clear, therefore, that a contextual interpretation which takes into account the purpose of the legislation is necessary.

The purpose of the legislation

56. We agree also with Mr Carey's submissions on the underlying policy of the Excise Directive. This was described by the Advocate General in his opinion in *WR* as follows:

> "As far as the aims of the Directive are concerned … the *broad wording* of the provisions at issue, which concern a series of persons potentially liable for the duties without any order of priorities being established, and who are jointly liable, seeks to guarantee that the tax debt is paid effectively and for this purpose *someone must be held responsible*." [29]

57. The CJEU decision in *WR* (at [33]) summarised this as reflecting the intention of the EU Legislature to lay down a broad definition of the persons liable to pay excise duty on goods released for consumption in order to ensure that so far as possible that the duty is collected.

58. The principle of ensuring the collection of tax was recognised also by Baker LJ in the Court of Appeal when it first considered *Perfect* in 2019 ([2019] EWCA Civ 465) and again by Newey LJ when it subsequently applied the CJEU determination of the question.

> "We agree that the underlying policy of the 2008 Directive is, as identified by the Upper Tribunal in [*B&M Retail Ltd v Revenue and Customs Comrs* [2016] UK UT 429 TC, [2016] STC 2456], 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." [66]

The consequences of the Appellant not being treated as holding the excise goods

59. We accept that if the Appellant were found not to be the holder of the excise goods, revenue loss would be likely as employers might then be able to use their employees as "shields" from liability.

60. In a case where an employer has *de facto* and/or legal control over excise goods it would also seem an extraordinary result if it was prevented from being regarded as holder of those excise goods purely on the grounds that its employee was the person in physical possession.

61. This would clearly be contrary to the underlying policy of the Excise Directive. It would also seem inconsistent with the principle of fairness which the Advocate General in *WR* saw, together with proportionality, as "cornerstones" of EU law (see para. [52] of the opinion).

The issue of physical possession

62. In WR, the Advocate General stated that:

> "The normal meaning of the words "holding" and "making the delivery" of goods used in the Directive is clear; they require only physical possession of the goods, In view of the absence of divergence in this respect between the various language version of the text, it may be concluded that the expression 'person holding the goods" covers anyone who is in physical possession of them unless that interpretation is contradicted by the purpose of the provision or by general principles of law." [43]

63. Physical possession was not, however, an issue in that case as it was not in dispute and the referral to the CJEU assumed that the holder was in physical possession. The issue was not therefore discussed in much depth.

64. The requirement for a "holder" to have physical possession was considered in more detail in *Dawson*, to which of course the parties were referred by this Tribunal.

65. In *Dawson*, the FTT was required to determine, as one of three preliminary issues, and on the basis of a set of assumed facts, the following question:

> "Whether a person who has *de facto* and/or legal control of the goods but who does not have physical possession of the goods "holds" the goods for the purpose of regulation 6(1)(b)/Art 7(2)(b) consistent with the definition of "held" under regulation [Article] 33 of the Regulations (the "Holding Point")."

66. The request was from Dawson's Wales Ltd ("DWL") who had been assessed to excise duty as holder of excise goods in its physical possession and on which duty had not been paid. HMRC assessed DWL as it could not identify anyone earlier in the chain who had physical possession of the goods in the UK (and so there was no earlier excise duty point). DWL argued that HMRC should have assessed as holder its supplier. This was on the basis that although the supplier did not take physical possession of the goods it had *de facto* and/or legal control of them as it was able to direct their supply to DWL.

67. The FTT found, on the assumed facts, that a person with *de facto* and/or legal control over excise goods can be a holder even if he does not have physical possession - and so DWL's supplier was a holder.

68. When reviewing the FTT's decision, the UT considered the legislative scheme of the Excise Directive and the case law relating to "holding". It concluded that the focus of the legislation was on the physical location of excise goods once they left a duty suspension arrangement and, consequently, physical possession of those goods ought to be the starting point of any determination of the holder of those goods for the purpose of the Excise Directive. See for example [142] of the UT decision:

> "It follows from the fact that the focus of the scheme established under the 2008 Directive is on the goods themselves that the starting point in determining who is "holding" the goods at the relevant time must be on the person who has physical possession of them." [142]

69. The UT concluded that the FTT had erred in law by determining the Holding Question on assumed facts. This was because, as the UT found, the question is one law and fact requiring consideration of the actual facts. The UT sent the question back to the FTT setting out what it saw as four matters to be established in the circumstances in order to determine whether an earlier excise duty point existed. In the UT's view the determination could be made only after those matters had been established.

70. Although the matters set out by the UT were *obiter* given its reasons for overturning the FTT decision, they carry some weight as the FTT was directed to re-make its decision based on their application.

71. The four matters identified by the UT were, in summary: (1) who had physical possession at the time the alleged earlier excise duty point occurred, (2) who is the person alleged to have *de facto* or legal control over the goods who it is said should be assessed rather than the subsequent holder and how that person is said to have control and the basis on which it was being exercised, (3) the time at which the excise duty point arose, and (4) where the goods were being held at the relevant time (see [149] of the UT decision). Having established them it was for the Tribunal to then assess, taking into account those facts, who should be regarded as the holder.

72. In the Court of Appeal, counsel for DWL argued that the prescriptive approach outlined by the UT is not the correct test with Asplin LJ noting that:

> "Mr Firth submits that the appropriate test is set out in *R v Tatham* at para 23(d) and there is no basis for the prescriptive requirements set out at para 149 of the UT decision. He says that such an approach is consistent with the purpose of the Excise Directive which, as the Advocate General and the CJEU in *Perfect* case explained, is amongst other things, to ensure that duty is collected" [75].

73. The *R v Tatham* test is as follows:

> "holding" for the purposes of Reg.13(1) can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for "holding" is that the person is capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or acting through an agent …" [29]

74. Asplin LJ did not agree with Counsel for DWL, her response was that:

> "If Mr Firth were correct, it seems to me it would lead to the opposite effect from the one which he advocates. Rather than cast a wide net which would encourage the collection of duty, the reverse would be the case. Anyone in physical possession of excise goods 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. HMRC, in all likelihood, however, would be unable to identify a person to assess." [76]

75. She went on to confirm her agreement with the UT's first factor (Who had physical possession at the time the alleged earlier excise duty point arose?), noting that this approach was supported by *Perfect* itself where physical possession of the excise goods was "the touchstone" [77 -78].

76. She agreed also with the UT's third and fourth factors, seeing the time of release for consumption as crucial based on the wording of Article 7(1) of the Excise Directive and recognising the time at which the duty point arose and the location of the goods at that time as crucial to the smooth running of the duty regime [87 - 88].

77. She did not comment on the second factor – other than to note that it was not disputed by DWL.

78. We find the factors identified by the UT in *Dawson* to be a useful guide in determining who to regard as holder in circumstances where physical possession and *de facto* and/or legal control are separated as they are in our situation, noting in this regard that the second factor must now be seen in the context of *Perfect* and *WR*.

79. This is notwithstanding the fact that in *Dawson* the factors were intended to aid identification of an earlier excise duty point in circumstances where an assessment was being challenged on the basis of there being an earlier excise duty point against which the assessment should have been made.

80. We also take into account the fact that *Dawson* and the majority of cases considered in it, including *Perfect*, involve persons arguing that they should not be assessed to duty simply on the basis of having physical possession of excise goods. The Appellant's position is, in effect, the reverse as she contends that she should not be assessed to duty as she did not have physical possession of the relevant excise goods. Although the situation is the reverse, we consider that the principle of physical possession not being determinative must apply equally.

81. The approach of the UT and Court of Appeal in *Dawson* demonstrates that the determination of "holding" is a question of law and fact. Although the initial focus, given the

scheme and wording of the legislation together with the case law, is necessarily on the physical location of goods so giving weight to physical possession – that is not the end of the matter and a more detailed consideration of the facts is needed.

82. Although Asplin LJ was careful to not express a view on the question of whether *de facto* and/or legal control is sufficient for the purpose of holding, as that issue was not before the court (see [72] of the Court of Appeal judgment), her decision shows that physical possession alone is not necessarily sufficient.

83. As the UT commented in *Dawson* it is consistent with the legislation and case law to adopt an approach that establishes first who has physical possession of the goods but then considers whether the circumstances of that possession are such that it is inappropriate for that person to be considered to be "holding" the goods (see [143] of the UT judgment).

84. We note in this regard Asplin LJ's comment on the term "inappropriate" being inaposite following the decision in *Davison and Robinson* – see [28] of the Court of Appeal judgment. We take this comment to be a reference to any use of *discretion* by HMRC in its determination of who should be assessed in circumstances where there are multiple holders/excise duty points and not to the initial evaluation by HMRC of the facts to determine whether a person is or is not in fact a holder. This would be consistent with the decision in *Davison and Robinson* which confirms the need for HMRC to assess against the first excise duty point that it is able to establish.

85. Finally, on *Dawson* we should add that although it considered the provisions of Regs. 6 and 7 of the Excise Directive (duty suspension arrangements), the UT confirmed that "holding" should bear the same meaning throughout the Excise Directive and not mean different things in different articles of the same Directive (see [144] of the UT decision). This was confirmed by Asplin LJ in the Court of Appeal;

> "Furthermore, there can be no doubt that "holding" must be given a consistent meaning in all Member States and throughout the Excise Directive. Nothing turns, therefore upon the point that the Perfect case was concerned with the meaning of holding" for the purposes of article 3 rather than article 7(2)(b). There is also no question but that the HMDP Regulations must be interpreted in conformity with the Excise Directive" [70]

86. The discussion in *Dawson* is therefore equally relevant to the provisions of Article 33 of the Excise Directive and Reg.13.

87. If we adopt the *Dawson* approach as a guide, the four factors are quite simple to establish:

(1) Physical possession is with the Appellant's employee (Factor 1);

(2) The Appellant, as found by the FTT, is the person with *de facto* and/or legal control of the goods as she was able to determine where they were transported to by directing her employee who was driving her lorry (Factor 2);

(3) There is no difference in timing between the excise duty points which (under this ground) the Appellant and the Respondent seek to establish – this is when the goods were first held in the UK as per Reg.13(1) - which in practical terms was when they were brought into the UK on the Appellant's lorry (Factor 3); and

(4) The location of the goods – in this case on the lorry - is also the same (Factor 4).

88. It is then necessary for us to consider the circumstances in respect of which the Respondents contend that the Appellant (the person in control) rather than the employee (the person with physical possession) should be regarded as holder and whether those circumstances outweigh the Appellant's lack of physical possession.

89. Here we see the position as clear. The Appellant had entered into an arrangement with the manufacturer of the goods for the transportation and delivery by her business of the goods and was discharging her obligations under that arrangement by directing her employee who was driving her vehicle to deliver the goods accordingly.

90. On this straightforward combination of facts we consider it legally correct and consistent with the operation of the Excise Directive and so the HMDP Regulations to treat the Appellant and not her employee as holder. Put simply, the circumstances in which the Appellant had control outweigh the fact that physical possession of the excise goods was with her employee.

91. We are reinforced in this view by the comments of the Advocate General in *WR*, who stated that:

> "The word "holding" in Article 33(1) and (3) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty … is to be interpreted as *including simple physical possession* such as the situation of WR in the case in the main proceedings" [58] (our italics)

92. "Simple physical possession" was not, in his view, the only way in which a person can be found to be holding.

93. More specifically, and relevant to the issue in this case, we also note his further comments (our italics);

> "As the United Kingdom Government added, to import a knowledge requirement into the concept of 'holding' or 'making the delivery' in Article 8(1)(b) and Article 33(3) of the Directive would undermine its object and purpose. It would create a means by which excise duty could be evaded relatively easily. *Thus an individual found in physical possession of chargeable goods, could – such as WR had done here – simply fail to identify the person who had employed him or her to transport the goods* or any other details concerning ownership of the goods (either wilfully or because he or she had been given false details). [37]
>
> Again, this would make it difficult to combat fraud and abuse, whereas the scheme of the Directive itself and recitals require that the national authorities must ensure that the tax debt is in fact collected …" [38]

94. His acknowledgment of and response to the following submission made by *WR* is also instructive (again our italics):

> [the submission]
>
> "A decision that someone in WR's position is liable to excise duty would cause commercial chaos because it would mean that a delivery driver (say, working for DHL) who collected a case of wine from point A and delivered it to point B would (simply because he knew or should have known from the markings on the package that it contained wine) be liable to account for duty if it turned out that no duty had been paid on that case [15]"
>
> [the response]
>
> "The argument raised by WR in relation to the example of a DHL driver (in point 15 of the present Opinion) can be easily dismissed, *A person making a delivery for DHL would not be liable, but DHL – the undertaking itself – would.* As the Netherlands Government pointed out, WR is to be regarded as self employed and thus as an entrepreneur who accepted to work without any written contract and to be paid in cash. Entrepreneurship involves entrepreneurial risk and that includes an entreprenuer being personally

> responsible for the persons with whom he or she does business and from whom he or she accepts commissions. Furthermore, an entrepreneur can protect himself or herself against such risks through insurance or by assigning those risks contractually to the clients" [39]

95. It seems clear to us that the Advocate General would have expected an employer to have been liable had the driver in WR been an employee and the employer identifiable.

Conclusion on Ground 1

96. For the reasons given, we find that the Appellant is the "holder" of the excise goods for the purpose of Article 33 of the Excise Directive and so Reg.13(2)(b) of the HMDP Regulations.

97. Our decision is based on the law and the particular facts of this case and we consider such an interpretation to be consistent with the objective of the Excise Directive, and therefore the HMDP Regulations.

98. We note that there is an alternative analysis which could be applicable in the circumstances. This analysis relies on the proposition that in suitable circumstances an employee's physical holding of goods can be "attributed" to its employer. This would lead to the same result and would also not be inconsistent with the Advocate General's views in *WR*. However, this point was not raised by the parties or argued before us and so we have not made our decision on this basis.

99. We find, therefore, that the FTT did not err in law in concluding that the Appellant was the person holding the excise goods and so dismiss this ground of appeal.

Ground 2

100. We go on to consider Ground 2 for completeness.

The parties' submissions

101. The Appellant does not differentiate between Reg.13(2)(a) and Reg.13(2)(b) in her arguments and HMRC have taken the view that her arguments on each of those provisions are the same. No further arguments are, therefore, advanced by HMRC on this ground.

102. The FTT found the Appellant liable under Reg.13(2)(a) as well as Reg.13(2)(b), but chose to focus on Reg.13(2)(b) simply because of the amount of authority on 13(2)(b) (see [95] of the Decision).

103. As with the term "holding" in Reg.13(2)(b), there is no legislative definition of the term "making delivery" for the purpose of the HMDP Regulations or the Excise Directive and there is little authority on the meaning of the term.

104. In line with the approach that we have concluded should be taken on Reg.13(2)(b), Reg.13(2)(a) also falls to be interpreted in accordance with its normal meaning unless, as stated by the Attorney General in *WR*, "that interpretation is contradicted by the purpose of the provision or by general principles of law." [43]. The cases also make it clear that EU provisions are to be interpreted in context.

105. The specific question for us to determine is whether the fact that the Appellant did not have physical possession of the excise goods prevents her from being the "person making the delivery of the goods" for the purposes of Reg.13(2)(a).

106. The decisions that we refer to above in our discussion on Reg.13(2)(b) focus on the fact that the ordinary meaning of the term "holding" denotes some form of possession, see, for example *Taylor and Woods* and the decision of the CJEU in *WR* that:

> "The concept of a person who "holds" goods refers, in everyday language, to a person who is in physical possession of those goods" [24]

107. *Dawson* also tells us that the scheme of the Excise Directive (and so the HMDP Regulations) focuses on the physical location of excise goods – and so physical possession of excise goods should be the starting point when considering who is the person "holding" the goods. No differentiation in this regard has been made between the separate limbs of Reg. 13(2) (or Article 33) – and logically that must be correct as they are, in aggregate, all aimed at ensuring that duty is paid.

108. The requirement for physical possession specifically in the context of a person "making delivery" of excise goods has not to our knowledge been considered in detail judicially.

109. In *Perfect* and *WR*, Regs.13(2)(a) and (b) were considered together, but the issue in that case was the knowledge of the person assessed, not physical possession of the excise goods which was not in dispute. In that context, we note the Attorney General's view in WR that (our italics):

> "the normal meaning of the words "holding" *and* "making the delivery" of goods used in the Directive is clear: they require only physical possession of the goods." [43]

110. He does not, however, elaborate on this comment in relation to "making the delivery" nor is it referred to in the CJEU judgment which refers only to "holding". It is therefore an isolated comment and as such it is difficult to assess its weight.

111. We would expect the determination of whether someone is "making the delivery" of excise goods to follow a similar approach to the determination of whether a person is "holding" excise goods. Regs. 13(2)(a), (b) and (c) are, in effect, tracking the physical movement of goods from leaving a duty suspension arrangement to being in the possession of the end user and are sequential.

112. Given the Excise Directive's focus on the physical location of the excise goods we would, therefore, expect physical possession of the excise goods to form an important part of the determination of whether a person is "making delivery of" those goods although, as with "holding", for physical possession to not be definitive.

Conclusion on Ground 2

113. For the same reasons given in relation to Reg 13(2)(b) and again using *Dawson* as a guide, we consider that in the circumstances of this case the Appellant rather than her employee should be regarded as the person making delivery of the goods for the purpose of Reg 13(2)(b). She accepted the order to deliver the goods and was carrying out that order using her vehicle and her employee acting under her instruction.

114. We agree therefore with the decision of the FTT and dismiss this ground of appeal.

The sub-issues

115. Both of the sub-issues identified by the UT in its permission to appeal decision of 29 October 2018 go to the issue of the Appellant's knowledge that excise goods were being smuggled, as that was a determining factor in the FTT decision. The issue of knowledge (whether actual or constructive) has, however, been rendered academic in this context following the decision in *WR* and the CJEU's conclusion that there is no knowledge requirement in Article 33 or Reg.13.

116. As Newey LJ concluded in *Perfect* when applying the CJEU's ruling in *WR*:

> "… it seems to me that we are bound by the CJEU's judgment of 10 June 2021 to hold, as was anyway this Court's inclination that art 33 of the 2008 directive and, hence, reg.13 of the 2010 regulations:
>
> > "must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty'.
>
> In other words, a person need not be aware that excise duty is being evaded to be "holding" or 'making … delivery of' goods for the purposes of reg 13 of the 2010 regulations or art 33 of the 2008 directive." [22]

117. As the sub issues are no longer relevant we do not consider them further.

THE PTA GROUNDS

118. We now turn to the PTA Grounds, noting that some of them are, as expected, addressed already in the Grounds of Appeal.

PTA Ground 1

Whether the FTT erred in finding that the Appellant held the goods on the basis that she was in de facto and/or legal control of the goods

119. The Appellant's argument under this ground is that physical possession is required in order to be regarded as holding the goods for the purpose of the HMDP Regulations. This argument is addressed in Ground 1 above and so we do not need to give permission to appeal again.

PTA Ground 2

Whether a finding that a person holds goods for the purposes of the HMDP Regulations as well as requiring control of goods also requires a state of knowledge that the goods have been released for consumption in the UK – whether a finding of actual or constructive knowledge is a necessary requirement of the determination that they are holding goods.

120. This ground is concerned with whether knowledge, actual or constructive, in relation to the excise status of goods, is necessary to be regarded as "holder" for the purposes of the HMDP Regulations. As outlined above in relation to the sub-issues, knowledge whether actual or constructive is no longer a requirement for liability following the decisions in *Perfect* and *WR*. This ground of appeal is, therefore, redundant and permission to appeal on this ground is denied.

PTA Ground 3

Whether the FTT erred in finding that the Appellant had constructive knowledge that the load on her lorry included smuggled cigarettes (that the goods were being imported into the UK without excise duty being paid and they were to be held for a commercial purpose in the UK).

121. As with PTA Ground 2, this ground is concerned with the Appellant's knowledge and so redundant. Permission to appeal on this ground of appeal is therefore denied.

PTA Ground 4

Whether the FTT erred in its alternative finding that the Appellant was making delivery of the goods

122. The Appellant's argument on this ground is that the FTT's finding was in error as the Appellant did not have physical possession of the goods. This argument is addressed in Appeal Ground 2 and so does not need to be addressed as an additional ground. Permission to appeal is therefore denied.

PTA Ground 5

Whether the FTT erred in not considering whether an earlier excise duty point could be established against which the assessment should have been made and not determining that the assessment should have been made against someone other than the Appellant.

123. The Appellant's argument here is that as an earlier excise duty point had arisen, and there was an identifiable holder of the goods at that time, HMRC were obliged to assess that earlier holder.

124. Ms Nicholas identifies the earlier excise duty point as having arisen immediately after the excise goods (in this case, the cigarettes) were manufactured in Lodz, Poland (as they were never held within a duty suspension regime), and the earlier holder as their manufacturer (Mr Drodz).

125. She relies here on Reg.13(1) which provides that;

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

126. She relies also on *Davison and Robinson Limited v The Commissioners for HMRC* [2018] UKUT 0437 (TCC), as referred to in *Dawson*, as support for her contention that the assessment should have been made against the earliest point in time at which HMRC were able to establish that the goods were held outside a duty suspension arrangement.

127. We agree that following *Davison and Robinson* HMRC must assess against the first excise duty point it is able to establish. This was acknowledged in *Dawson* (and indeed the reason for that case). As Asplin LJ noted in her judgment:

> "It is now common ground that the Respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC") are required, as a matter of law, to assess the first "holder" of the excise goods within the meaning of the Excise Directive and the HMDP Regulations, whose identity it can establish" [3]

128. However, we do not agree with Ms Nicholas as to the application of this principle in this case.

129. As the goods were first held outside a duty suspension arrangement in Poland, they will have been released for consumption at that time in Poland. What Reg.13(1) seeks to identify is the first excise duty point *in the UK* and it looks therefore to the first time at which the goods are held for a commercial purpose *in the UK*. The excise duty point for the purpose of Reg.13 is, consequently, not the release for consumption by Mr Drodz in Poland, it is the entry of the goods into the UK.

130. There has, therefore, been no error of law on the part of the FTT in this regard and permission to appeal on this ground is denied as, given our conclusion, it has no reasonable prospect of success.

PTA Ground 6

Whether the FTT's findings on the Appellant's control, knowledge, holding or delivering goods meant that it erred in determining the penalty in this case.

131. The Appellant has not advanced any substantive argument in support of this ground and so we are unable to consider it. Permission to appeal on this ground is accordingly denied.

DECISION

132. For the reasons given we dismiss this appeal and do not give permission to the Appellant to expand its grounds of appeal to include the additional grounds sought by it.

COSTS

133. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application, as required by Rule 10(5) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE ADAM JOHNSON
JUDGE VIMAL TILAKAPALA

UPPER TRIBUNAL JUDGES

DATED: 01 February 2024