

**Anonymised version**

C-279/19 - 1

**Case C-279/19**

**Request for a preliminary ruling**

**Date lodged:**

3 April 2019

**Referring court:**

Court of Appeal (United Kingdom)

**Date of the decision to refer:**

19 March 2019

**Appellant:**

The Commissioners for Her Majesty's Revenue and Customs

**Respondent:**

WR

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TUESDAY 19TH MARCH 2019

**IN THE COURT OF APPEAL**

[OMISSIS]

**BETWEEN**

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

[OMISSIS]

**APPELLANT**

[OMISSIS] - and-

WR

RESPONDENT

EN

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**UPON** the Appellant's appeal

**AND UPON** hearing from Counsel for the Appellant and Counsel for the Respondent

**IT IS ORDERED:**

1. The Appellant's appeal against the Upper Tribunal's decision in relation to the penalty issued to the Respondent pursuant to Schedule 41 of the Finance Act 2008 is dismissed.
2. The Appellant's appeal against the Upper Tribunal's decision in relation to the assessment to excise duty issued to the Appellant pursuant to Regulation 13(1) and (2) of the Excise Goods (Holding, Movement and Duty Point Regulations) 2010 is adjourned pending determination by the Court of Justice of the European Union of the reference appended to this order.
3. [OMISSIS]

[OMISSIS]

**IN THE COURT OF APPEAL**

[OMISSIS]

**CIVIL DIVISION**

**ON APPEAL FROM THE UPPER TRIBUNAL**

**(TAX AND CHANCERY CHAMBER)**

**BETWEEN:**

**THE COMMISSIONERS FOR HM REVENUE & CUSTOMS**

**Appellant**

**and**

**WR**

**Respondent**

**REQUEST FOR A PRELIMINARY RULING PURSUANT TO  
ARTICLE 267 OF THE TREATY ON THE FUNCTIONING  
OF THE EUROPEAN UNION**

**QUESTIONS REFERRED**

1. Is a person ('P') who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B, liable for that excise duty pursuant to Article 33(3) of Directive 2008/118/EC ("the Directive") in circumstances where that person:
  - a had no legal or beneficial interest in the excise goods;
  - b was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and
  - c 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 **[Or. 2]** chargeable to excise duty in Member State B at or prior to the time that they became so chargeable?
2. Is the answer to Question 1 different if P did not know that the goods he was in possession of were excise goods?

### **Introduction**

3. This reference arises out of appeal proceedings relating to an assessment to excise duty issued by HMRC to WR. The material facts can be stated as follows:
4. On 6 September 2013, a Heavy Goods Vehicle ('HGV') being driven by WR was stopped at Dover Easter Docks by UKBA officers. The HGV was loaded with 26 pallets of beer. WR produced to the UKBA Officers a CMR which stated that the goods were covered by an Administrative Electronic Document with a stated ARC number. The CMR also stated that the consignor was a bonded warehouse in Germany, and that the consignee was Seabrook Warehousing Ltd, a UK bonded warehouse. Accordingly, the documentation was consistent with the goods travelling in duty suspense.
5. However, it transpired that the ARC stated on the CMR had already been used in relation to a previous consignment of beer to Seabrooks. Accordingly, the load was, contrary to the documentation, not in duty suspense. Thus, when the goods arrived into the UK, a UK duty point arose.
6. HMRC issued WR with:
  - a An assessment to excise duty in the amount of £22,779 pursuant to Regulation 13(1) and (2) of the Excise Goods (Holding, Movement and Duty Point Regulations) 2010;
  - b A penalty in the amount of £4,897.48 pursuant to schedule 41 of the Finance Act 2008. **[Or. 3]**
7. WR appealed the excise assessment (and the penalty) to the First-tier Tribunal (Tax Chamber) ('FTT').

### **The FTT**

8. The FTT made the following findings of fact:
  - a WR was an experienced lorry driver, who had been employed by a haulage company from 2009-2013 and regarded himself as self-employed since 2013 (registering as such with the tax authorities only in 2015). He was paid in cash with no deductions (paragraph 43). Sometime in 2014 he agreed to work for a business he understood was called 'Kells' in return for £250 per week based on two to three days' work and if he worked longer £350-£360. There was no written contract and he was paid in cash in person or by the money being concealed at the lorry park for him to collect (paragraph 44).
  - b WR would go to a lorry park and pick up an empty trailer, which he would take to a secure trailer park in Calais and swap for a loaded trailer of goods to be brought into the UK. He would find the

documentation for the load in a tube on the side of the trailer and would look at the documentation, which consisted of a CMR and Delivery Note to ascertain the nature of the goods he was carrying and their destination (paragraph 45). In the world in which WR operated these informal arrangements were not to be regarded as unusual with lorry drivers from time to time employed (whether the circumstances justified that conclusion or not) being paid in cash without any documentation to back up the arrangements, being disinterested in the identify of those engaging them and remaining off the radar as far as HMRC was concerned (paragraph 63).

- c On 6 September 2013 WR picked up a consignment of beer destined for an excise warehouse: Seabrook, in the UK. WR therefore knew the consignment consisted of excise goods. He was stopped by UK and Border Force Officials on entering the UK. The CMR that he produced had an ARC reference number (paragraph[s] 45-46). The UK Border Force officials checked the EMCS system and established that the ARC number [Or. 4] related to an earlier consignment of beer to the same warehouse (paragraph 47). The Border Force officials seized the vehicle and excise goods. WR informed the person who had instructed him to collect the goods: 'Des', of what had happened and was picked up at Dover. He was paid his money for the week and had no further contact with Des.
- d WR was not a conspirator in relation to the smuggling attempt. He was subject to control by whoever it was who was arranging for the goods to be smuggled and it is those persons who had the de facto and legal right of control over the goods at the time that they were seized. WR had no interest of his own in the goods, his only interest was to follow instructions in collecting and delivering them and be paid modestly for his services in doing so. Neither was he the owner of the vehicle. The identify of those behind the smuggling attempt and knowingly participating in it cannot be ascertained (paragraph 58);
- e The only information that WR had was to be found in the documentation he collected when he picked up the goods and on the face of it this documentation was consistent with the movement of goods subject to a valid duty suspended arrangement. WR had no means of checking whether the ARC stated on the CMR had been used or not (paragraph 61). There was nothing on the face of the documents to put him on enquiry and he could not have access to the EMCS system (paragraph 62).
- f Accordingly, WR was to be regarded as an 'innocent agent' (paragraph 64);

- g HMRC has made no real attempt to find out who owns the vehicle or who was behind the attempted smuggling (paragraphs 52 and 58).
9. The FTT considered the domestic authorities, including the Court of Appeal's judgment in *Taylor and Wood v R* [2013] EWCA Crim 1151, and concluded :
- a an 'innocent agent' that is in physical possession of smuggled goods is not to be regarded as 'holding' those goods for the purposes of Regulation 13 (paragraph 38); **[Or. 5]**
  - b *'actual or constructive knowledge of his physical possession of smuggled goods might be sufficient to constitute "holding"...and take such a person outside the status of "innocent agent"'* (paragraph 38);
  - c WR was an innocent agent and therefore cannot be said to have been 'holding' the goods nor 'making delivery of the goods' for the purposes of Regulation 13 (paragraphs 60-64);
  - d *'Imposing liability on WR in the circumstances that we have found would raise serious questions of compatibility with the objectives of the legislation.'* (paragraphs 60-64);
10. The FTT allowed WR's appeal and discharged the assessment to excise duty (and the penalty).
11. HMRC appealed the FTT's decision to the Upper Tribunal (Tax and Chancery Chamber). The appeal did not seek to challenge the FTT's findings of fact.

### **The Upper Tribunal**

12. On 8 December 2017, the Upper Tribunal dismissed HMRC's appeal stating in relevant part:
- a *'There is no appeal against the FTT's findings of fact. Nor could there be. The consequence is that this appeal proceeds on the basis that WR had neither actual nor constructive knowledge of the smuggling attempt.'* (paragraph 16)
  - b *'the words "delivery" and "holding" as they appear in regulation 13 are words which appear in the Directive (and in Directive 92/12 which preceded it). They represent independent concepts of EU law which must be accorded an EU-compliant meaning'* (paragraph 50)
  - c *'The Court of Appeal [in Taylor & Wood, and Tatham] has confirmed that a person who lacks actual and constructive knowledge will not 'hold' the goods for the purposes of the regulations. This is to recognise that the broad [Or. 6] words are subject to an exception for those who are "innocent agents"'* (paragraph 51)

- d The innocent agent exception will protect from liability persons who lack actual or constructive knowledge that the goods he/she is transporting are goods on which excise duty should (but has not) been paid (see paragraphs 54-55).
- e *'We do not accept that it is fair, proportionate or reasonable to impose liability for evaded excise duty on HGV drivers who are found in possession of the goods at the point that the evasion is discovered, but who lack any involvement in or knowledge of the criminal enterprise; they are not aware that tax has been evaded on the goods they are carrying, and nor can it be said that they should have been aware. To impose liability on those drivers simply because they are in possession of the goods at the time that the fraud is discovered, but without knowledge of what has occurred or is intended, is neither fair nor proportionate.'* (paragraph 57)
- f To impose liability on entirely innocent agents would run contrary to the Directive and the domestic legislation (paragraph 58).

13. HMRC appealed the Upper Tribunal's decision to the Court of Appeal.

#### **The Court of Appeal**

- 14. The Court of Appeal concluded that the question whether a lorry driver who had no interest in the goods and did not know, or have any reason to believe, that the goods were chargeable to excise duty should be liable under the Directive to pay the duty was not *acte clair* and should therefore be referred to the CJEU for a preliminary ruling. HMRC's appeal against the Upper Tribunal's decision upholding the decision of the FTT discharging the excise duty assessment was therefore adjourned.
- 15. The Court of Appeal dismissed HMRC's appeal against the Upper Tribunal's decision in respect of the penalty imposed under Schedule 4 to the Finance Act 2008. [Or. 7]
- 16. The reasons for the Court of Appeal's decision are set out in its judgment dated 19 March 2019.

#### **The Domestic Legislation**

- 17. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides in relevant part:
  - 1) *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.*

- 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.*

### **Relevant EU law provisions**

18. Article 33 of Council Directive 2008/118/EC provides in relevant part:

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 [Or. 8] delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.*

### **Domestic Case law**

19. In *R v Tatham* [2014] EWCA Crim 226, the Court of Appeal at paragraph 23 considered the Court’s decision in *R v Taylor and Wood* [2013] EWCA Crim 1151, and confirmed that *Taylor and Wood* stood for the proposition that ‘a courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which his payable upon them, cannot be the ‘holder’. (emphasis supplied)
20. At paragraph 39 of *Taylor and Wood*, the Court of Appeal had stated:

*‘For the same reasons that have already been elaborated in interpreting Regulation 13(1) of the [2001] Regulations, both the language and purpose of Article 7(3) [the predecessor to Art 33 of the Directive] strongly support the conclusion that a person who has de facto and legal control of the goods*

*at the excise duty point should be liable to pay the duty. That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents such as Heijboer or Yeardley, rather than upon the appellants, would no more promote the objectives of the Directive than those of the Regulations.'*

### **Outline submissions of the Parties**

#### **WR [Or. 9]**

21. The Respondent submits that [that] approach of the Upper Tribunal (and of the Court of Appeal in *Tatham* and *Taylor & Wood*) (i.e. that [those] who have no interest in the goods that have been moved and who do not know - and had no reason to believe - that the goods have outstanding duty on them should not be liable to pay excise duty chargeable on those goods) is consistent with the scheme and purpose of the Directive and wider principles of EU law (specifically proportionality and fairness).
22. The Directive aims to ensure that there is a Community-wide system in place under which excise duty is properly charged and collected including when goods move between Member States. However, nothing in the Directive points to that tax should be collected from those who have no interest in the goods that have been moved and who do not know (and had no reason to believe) that the goods had outstanding duty on them. Such an interpretation would not be appropriate and necessary to secure the aims pursued by the Directive and would therefore breach the principle of proportionality (see paragraph 13 of Case C-331/88 *Fedesa*). Further, it would have the potential to cause commercial chaos. It would mean that a delivery driver (e.g. 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 (and pay a penalty) if it turned out that no duty had been paid on that case.
23. Further, the Directive makes specific provision in relation to 'irregular movements' of excise goods. Specifically Article 38 imposes liability for duty arising as a result of an irregularity on 'any person who participated in the irregularity'. It is submitted that 'participate' here must be intended to refer to someone that knew or should have known of the irregularity - participating suggesting some form of conscious act in relation to the 'irregularity.' Such an approach would be consistent with that of the CJEU in input tax cases - see Case C-439/04 *Kittel v Belgium*. As the FTT found in *Williams v HMRC* [2015] UKFTT 0330 (TC) at paragraph 103, this tends to suggest that, in the case of persons who have no interest in the goods, liability should only be imposed on

those who have actual or constructive knowledge that they are participating in an irregularity. **[Or. 10]**

**HMRC**

24. HMRC submits that the words of Article 8 and 33 of the Directive are clear [and that] ‘holding’ or ‘making the delivery’ should be given their normal meaning.
25. By giving the words of Articles 8 and 33 their normal meaning, the object and purpose of the Directive [are] met, namely to ensure (a) that liability is harmonised across the EU in relation to goods released for consumption on which excise duty has been evaded and (b) that excise duty on those goods is paid somewhere.
26. In that regard, HMRC submits that, were national legislation to exclude liability in respect of goods held or delivered by ‘innocent agents’, that is, by individuals holding or delivering excise goods who cannot be shown to have had actual or constructive knowledge that the goods were being smuggled, the evasion of excise duty would be facilitated. This is because those employed to transport the goods can be employed without them knowing or being able to identify the owner of the goods or the identities of those participating in the smuggling activity.
27. Accordingly, the only way to achieve the object and purpose of the Directive is to give the words ‘holding’ and ‘making delivery’ their normal meaning.