Neutral Citation Number: [2019] EWCA Civ 465

Case No: A3/2018/0911

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Upper Tribunal (Tax and Chancery Chamber)
UT/2016/0038

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 March 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE BAKER
and
MR JUSTICE NUGEE

- -

Between :

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS	**Appellant**
- and -	
MARTYN GLEN PERFECT	**Respondent**

- -
- -

Jessica Simor QC (instructed by **HMRC's Solicitors**) for the **Appellant**
David Bedenham (instructed by **Rainer Hughes**) for the **Respondent**

Hearing dates : 12 February 2019

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Approved Judgment

LORD JUSTICE BAKER (giving the judgment of the Court) :

1. The principal question arising on this appeal is whether a lorry driver who at the excise duty point is found to be carrying goods in respect of which duty has not been paid is strictly liable to pay the duty under EU law as implemented by statutory instrument in this country.

2. The point arises on an appeal by the Commissioners for HM Revenue and Customs ("HMRC") against a decision of the Upper Tribunal (Whipple J and UTJ Greenbank) upholding an earlier decision of the First-tier Tribunal ("FtT") in which it set aside an assessment served on the respondent, together with a penalty imposed by him under statute.

3. Counsel for HMRC contended that this case raises an important point of principle or practice, the outcome of which will have significant implications for indirect tax policy and HMRC's ability to fight excise fraud.

Summary of facts

4. The following summary is taken principally from the decision of the FtT.

5. The Excise Movement and Control System ("EMCS") is an EU-wide electronic system for recording and validating movements of duty-suspended excise goods within the EU. Authorised warehouse keepers and registered consignors of duty-suspended goods must complete and submit an electronic administrative document ("eAD") via the EMCS before the goods are moved. Once the information entered on the eAD is validated, EMCS generates a unique Administrative Reference Code ("ARC") for that particular movement. The ARC must travel with the goods and be available for presentation when requested. The consignor is therefore obliged to provide the person accompanying the goods during the course of the movement with a hard copy of a commercial document on which the ARC is clearly stated.

6. The respondent, Mr Martyn Perfect, is an experienced lorry driver. In August 2014, he began working for a firm which he identified to HMRC as "Kells Transport", having been offered work in a telephone call from an individual he knew only as "Des". As far as he was aware, the firm was based at a lorry park in Basildon in Essex where he would go to pick up the vehicle that he was asked to drive. The lorry would always be filled with fuel and he never had occasion to fill it up himself. If there was a job to do, he would receive a telephone call from "Des" and would go to the lorry park and pick up an empty trailer which he would take to a secure trailer park in Calais and swap for another trailer loaded with goods to be brought into the UK. He agreed to work for the company for £250 per week on the basis of two or three days' work, or more if he worked for a longer period. He would find the relevant documentation for the load in a tube on the side of the trailer, sometimes in a plastic wallet. He would look at the documentation, which consisted of a freight contract and delivery note, to ascertain the nature of the goods he was carrying and their destination. He was paid in cash at the end of the week.

7. On 6 September 2013, the appellant collected a lorry from Calais which was loaded with 26 pallets of beer. He looked at the documentation which confirmed that the consignment consisted of beer and that the ultimate destination was a warehouse in

Barking. On arrival at Dover Docks, he was stopped by the UK Border Force officers who, on checking the documentation, found that excise duty due on the consignment of beer had not been paid. The ARC identified on the contract documents had been allocated to a previous consignment. The contract stated that the consignor was a German bonded warehouse called Major Weine KG, that the consignee was a UK bonded warehouse called Seabrook Warehousing Ltd, and that the transporter was called "D Khells", with an address in County Fermanagh. When questioned, the appellant said that he was employed by a "D Kells" based in Basildon in Essex. Subsequent enquiries by HMRC have failed to locate a haulier or transport company with such a name based in Basildon. The postcode on the freight contract relates to a company called S.D.Kells Ltd which operates a chain of department stores in Northern Ireland.

8. As the goods had been transported without appropriate documentation, the lorry and goods were seized. Following the seizure, the appellant spoke to "Des" and told him what had happened. He was subsequently paid his money for the week but had no further contact with "Des" and did not work for him again. Notice of the seizure was sent to the consignor and to the appellant. The seizure of the goods was not challenged and as result they were duly condemned as forfeit.

9. Before the FtT, it was accepted by HMRC that the appellant would have no means of checking the ARC and whether it had previously been used because the system is only accessible by the UK Border Force or HMRC. The FtT found that the appellant had no information which could have led him to conclude that he knew he was carrying goods in respect of which excise duty had not been paid. The FtT added that it would not expect a lorry driver in his position to have subjected the documentation to detailed scrutiny and that it was unlikely that he would pick up discrepancies such as the different spelling of "Kells".

10. The FtT described the investigation carried out by HMRC as very limited. In particular, it made no attempt to identify the legal owner of the lorry, nor undertook any other search of DVLA records. At all times, HMRC has accepted that, although the evidence pointed overwhelmingly to an attempt to deliver excise goods to this country without payment of duty, it did not show that the appellant was actively involved in this attempt or that he himself deliberately attempted to evade excise duty.

11. Nevertheless, on 20 February 2014, HMRC sent a letter to the appellant headed "assessment and penalty explanation" in which it stated that, in the circumstances, the commissioners were entitled to assess him for the excise duty under s.12(1A) of the Finance Act 1994 and impose penalties under Schedule 41 to the Finance Act 2008; that, by virtue of the appellant's actions, an excise duty point had been created in the UK and excise duty had become liable on the goods seized in accordance with regulation 13(1) and (2) of the Excise Goods (Holding Movement and Duty Point) Regulations 2010, ("the 2010 Regulations") in the sum of £22,779; and that, as a result of his behaviour, it was imposing a penalty under Schedule 41 of the 2008 Act in the sum of £4,555. Following a review carried out at the request of the appellant's solicitors, the Revenue maintained the assessment of duty owed and increased the penalty to £4897.48.

12. On 4 September 2014, the appellant filed a notice of appeal against the assessment and penalty to the Tax Chamber of the FtT. On 19 October 2015, the FtT (Judge

Timothy Herrington and Mr Michael Bell ACA CTA) allowed the appeal and ordered that both the assessment and penalty should be discharged. HMRC appealed against that decision to the Tax and Chancery Chamber of the Upper Tribunal. On 8 December 2017, the Upper Tribunal dismissed the appeal in relation to the assessment and upheld the FtT's decision as to the penalty on different grounds.

13. On 19 April 2018, HMRC filed a notice of appeal to this Court against the Upper Tribunal's decision. On 25 June 2018, Floyd LJ granted permission to appeal.

The legislative and regulatory framework

14. Council Directive 2008/118/EC (concerning the general arrangements for excise duty and repealing Directive 92/12/EEC) ("the 2008 Directive") harmonises the principles to be applied across the EU concerning the point at which excise duty is levied on excise goods and the duty-suspended movement of goods between Member States. As its title indicates, the 2008 Directive replaced Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ("the 1992 Directive"). Ms Simor submitted that jurisprudence interpreting the 1992 Directive assists in interpreting the corresponding provisions of the 2008 Directive. That may be so, but it must be borne in mind that the scope of the 1992 Directive was somewhat narrower than that of the 2008 Directive.

15. Recital 8 to the 2008 Directive provides:

> "Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise goods are released for consumption and who the person liable to pay the excise duty is."

16. Chapter II of the Directive, headed "Chargeability, Reimbursement, Exemption" contains general provisions about those aspects of excise duty. Under section 1, headed "time and place of chargeability", Article 7 of the Directive provides, *inter alia*:

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

(d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement."

17. Article 8 provides, so far as relevant to this appeal:

"(1) The person liable to pay the excise duty that has become chargeable shall be:

…

(b) in relation to the holding of excise goods as referred to in Article 7(2)(b), the person holding the excise goods and any other person involved in the holding of the excise goods ….

(2) Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt."

18. Chapter V of the directive is headed "Movement and taxation of excise goods after release for consumption". Section 1 of the chapter, comprising Article 32, is headed "Acquisition by private individuals". Section 2 of the chapter is headed "Holding in another Member State". Article 33 provides, so far as relevant to this appeal:

"(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."

19. Section 5 of Chapter V is headed "Irregularities during the movement of excise goods". Article 38 provides, so far as relevant to this case:

"1. Where an irregularity has occurred during a movement of excise goods under Article 33(1) … in a Member State other than the Member State in which they were released for consumption, they shall be subject to excise duty and excise duty shall be chargeable in the Member State where the irregularity occurred.

> 2. Where an irregularity has been detected during a movement of excise goods under Article 33(1) … in a Member State other than the Member State in which they were released for consumption, and it is not possible to determine where the irregularity occurred, the irregularity shall be deemed to have occurred and the excise duty shall be chargeable in the Member State where the irregularity was detected.
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> However, if before the expiry of a period of three years from the date on which the excise goods were acquired, it is ascertained in which Member State the irregularity actually occurred, the provisions of paragraph 1 shall apply.
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> 3. The excise duty shall be due from … any person who participated in the irregularity."

20. Parliament has given effect to the 2008 Directive via the 2010 Regulations introduced under the Finance (No.2) Act 1992. The 2010 Regulations supersede earlier regulations passed under the same Act implementing the 1992 Directive. S.1 of the 1992 Act provides, so far as relevant to this appeal:

> "(1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ("the excise duty point").
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> …
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> (4) Where regulations under this section prescribe an excise duty point for any goods, such regulations may also make provision
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> (a) specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed); and
>
> (b) where more than one person is to be liable to pay the duty, specifying whether the liability is to be both joint and several."

21. Part 2 of the 2010 Regulations contains rules concerning excise duty points and payment of the duty. Regulations 5 to 7 contain rules concerning the excise duty point for goods released for consumption in the UK. Regulations 8 to 12 contain rules concerning the persons liable to pay duty in respect of goods released for consumption in the UK. Regulations 13 to 17 provide rules concerning the excise duty point and persons liable to pay duty on goods already released for consumption in another Member State.

22. Regulation 13 of the 2010 Regulations, which substantially follows Article 33(1) and (3) of the 2008 Directive, provides:

> "(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.

23. There is no further definition of 'holding' in the 2008 Directive, nor the 1992 Act, nor the 2010 Regulations.

24. The provisions governing the imposition of penalties for failing to pay excise duty in these circumstances are found in paragraph 4(1) of Schedule 41 to the Finance Act 2008 which provides:

"A penalty is payable by a person (P) where

(a) after the excise duty point for any goods which are chargeable with the duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

Paragraph 20 of the Schedule provides:

"(1) Liability to a penalty under … paragraph … 1 … does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of subparagraph (1)

(a) an insufficiency of funds is not a reasonable excuse and is attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless he took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

Case law

25. We now consider the case law cited to us bearing on the issue of strict liability under the Directive and 2010 Regulations.

(a) European cases

26. We were referred to a number of decisions of the ECJ and CJEU, mostly under the earlier 1992 Directive. As already mentioned, it must be borne in mind that the scope of the 1992 Directive was somewhat narrower than that of the 2008 Directive. Article 6(1) of the 1992 Directive, like Article 7(1) of the 2008 Directive, determined the point in time at which the excise duty became chargeable. Unlike the 2008 Directive, however, the 1992 Directive was silent as to the identity of the person or persons from whom the duty could be recovered.

27. In *van de Water v Staatssecretaris van Financien* (Case C-325/99, 5 April 2001), the ECJ held that the mere holding of a product subject to excise duty within the meaning of Article 3(1) of the 1992 Directive constitutes a release for consumption within the meaning of Article 6(1) of that Directive where duty has not already been levied on it pursuant to the applicable provisions of Community law and national legislation. The Court reiterated that the purpose of the Directive was to lay down various rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties was identical in all the Member States. On the other hand, the terms of Article 6(1) showed that it was clearly not the intention of the Community legislature to harmonise the procedures for the levying and collection of duty by the Member States. On the contrary, the Directive expressly left it to Member States to determine those procedures. It added, however, (at paragraph 41):

> " … it should be noted that, whilst Article 6 of the Directive does not specify the person liable to pay the duty chargeable, it follows from the scheme of the Directive … that the national authorities must in any event ensure that the tax debt is in fact collected."

28. More recently, the CJEU described the purpose of the 1992 Directive in *Gross v Hauptzollamt Braunschweig* (Case C-165/13, 3 July 2014) in these terms at paragraph 17:

> "the aim of Directive 92/12 is to lay down a number of rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties is identical in all the Member States. That harmonisation makes it possible, in principle, to avoid double taxation in relations between Member States…"

That case concerned the interpretation of Article 7 of Directive 92/12, the predecessor of Article 33 of the 2008 Regulation, and in particular whether successive holders of goods which had been released for consumption could be liable for excise duty. The CJEU concluded:

> "25. In particular, in expressly providing that the person 'receiving the products' at issue may be liable to excise duty on products subject to that duty released for consumption in a Member State and held for commercial purposes in another Member State, Article 7(3) of Directive 92/12 must be interpreted as meaning that any holder of the products at issue is liable to excise duty.

> 26. A more restrictive interpretation, to the effect that only the first holder of the products at issue is liable to excise duty, would defeat the purpose of Directive 92/12. Under that directive, the movement of products from the territory of one Member State to that of another may not give rise to systematic checks by national authorities, which are liable to impede the free movement of goods in the internal market of the European Union. Consequently, such an interpretation would render more uncertain the collection of excise duty due upon the crossing of an EU border."

29. In ***Kittel v Belgium*** (Case C-439/04, 6 July 2006), a case concerning liability to pay VAT, the CJEU held on a reference for a preliminary ruling that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, the relevant Directive should be interpreted as meaning that it precludes a rule of national law which causes the taxable person to lose the right to deduct VAT he has paid on the goods.

(b) Decisions of the appellate courts in this jurisdiction

30. The purpose of the 1992 Directive was succinctly summarised by Lord Hoffmann in *Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34. In his judgment (with which the majority of the House agreed), he said at paragraph 4:

> "The Directive was adopted as part of the creation of a single market without fiscal frontiers. The main purpose of the Directive was to have a single set of rules for determining the moment at which duty became payable, so as to avoid a situation in which duty could be levied on the same goods in different countries."

In that case, the House of Lords held that a warehouse company was strictly liable for duty on vodka manufactured which had been released for export from the company's tax warehouse but at some stage fraudulently diverted. Citing the decision in *van de Water*, Lord Hoffman noted (at paragraph 7) that the identity of the person or persons liable to pay duty after the goods were "released for consumption" was a matter which was left to Member States to decide for themselves. Under the relevant regulation, the words "released for consumption" were not qualified by any words such as "lawfully". Lord Hoffman therefore concluded that the warehouse company was strictly liable.

31. The decision in *Greenalls* is relied on by HMRC in support of its argument that any holder of the goods is strictly liable. The contrary argument on behalf of Mr Perfect derives principal support from two decisions of the Court of Appeal Criminal Division in which confiscation orders were made under the Proceeds of Crime Act 2002 ("POCA") following convictions for excise offences. Both cases were decided under the earlier directive and regulations but the corresponding provisions in the current versions are in substantially the same terms. The decisions follow a series of cases, including *R v May* [2008] UKHL 26 [2008] AC 1028, which established that the evasion of VAT or excise duty amounts to obtaining of a pecuniary advantage so as to render a defendant liable to a confiscation order only if the defendant is personally liable for the tax. In the two cases on which counsel for Mr Perfect relies, the question arose whether an "innocent agent" who is "holding" the goods is liable for duty and therefore liable for a confiscation order.

32. In *Taylor and Wood v R* [2013] EWCA Crim 1151, the Court (Leveson LJ, Kenneth Parker J and Sir David Clarke) considered appeals against confiscation orders against two defendants who pleaded guilty to being knowingly concerned in the fraudulent evasion of duty payable on the import of cigarettes. Taylor approached Wood, who carried on legitimate business as a freight forwarder, to collect counterfeit cigarettes from an enterprise in Belgium under the pretence that the load consisted of pallets of textiles. Wood instructed a road haulier called Yeardley to pick up the goods from Belgium and bring them to this country. No one at Yeardley knew the true nature of the goods being collected. Yeardley instructed a Dutch firm of road hauliers called Heijboer to collect the goods. In giving the judgment of the Court of Appeal, Kenneth Parker J described Yeardley and Heijboer as "innocent agents" who were unaware of the criminal enterprise. Prior to considering whether the confiscation orders against Taylor and Wood should be set aside, Kenneth Parker J considered two preliminary issues. First, was each appellant a person "liable to pay the duty" under the regulations? If the answer were no, the appeal must succeed because the appellant would not have evaded liability to pay duty and would have obtained no pecuniary advantage under POCA. Secondly, if the answer to the first question was yes, was the putative basis of the liability to pay duty under the regulation compatible with any of the bases of liability set out in the Directive?

33. On the first issue, Kenneth Parker J observed (at paragraph 29 - 31):

> "29. '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. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised …. But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, *Goode on Commercial Law,* Fourth Edition, p46. In the case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own exclusively as bailee at will, legal possession will be shared by bailor and bailee.
>
> 30. In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods …. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a 'holding' of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point ….
>
> 31. There is nothing, furthermore, in this interpretation and application of [the regulation] to the facts of this case that would be inimical to the purposes of the Finance Act. To seek to impose liability to pay duty on either Heijboer or Yeardley, who, as bailees, had actual possession of the cigarettes at the excise

> duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty."

34. On the second issue, Kenneth Parker J reached a similar conclusion (at paragraph 39):

> " … both the language and purpose of Article 7 (3) [of the 1992 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."

35. In *Tatham v R* [2014] EWCA Crim 226, the Court (Sir Brian Leveson P, Thirlwall and Phillips JJ) was again concerned with an appeal against the confiscation order by a defendant who had pleaded guilty to being knowingly concerned in the fraudulent evasion of the duty on tobacco products. In summarising the law, the President, who had of course been part of the constitution of the Court in *Taylor and Wood*, included as part of his summary of the legal principles the following observation (at paragraph 23e):

> "There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder' …. A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, *or the duty which is payable upon them*, cannot be the 'holder' within [the regulation] – *Taylor and Wood*." [emphasis added].

On the facts, of that case, the Court concluded that the appellant had been involved in the enterprise so that he was liable for the excise duty, and on that basis the appeal against the confiscation order was dismissed.

(c) Other decisions of the Upper Tribunal (Tax and Chancery Chamber)

36. In addition, Ms Simor on behalf HMRC cited three earlier decisions of the Upper Tribunal which she contended provided support for her clients' interpretation of the Directive and regulations.

37. In the first of these cases, *Butlers Ship Stores Ltd v HMRC* [2013] UKUT 564 (TCC) [2014] STC 732, HMRC assessed a taxpayer for excise duty in relation to consignments of alcohol which, as a result of fraud in which the taxpayer was not implicated, had disappeared from the taxpayer's warehouse. Before the Upper Tribunal it was common ground between the parties that the taxpayer was the consignor but was not at fault in any way for the disappearance of the goods. It was argued on behalf of the taxpayer that a tax warehouse keeper was not the person primarily liable for the duty and to make an innocent third party liable without it

being established that it was at fault in any way was a disproportionate response to the need to ensure that duty was paid. The Upper Tribunal (Lord Glennie) dismissed the appeal and, in doing so, rejected the argument based on proportionality. At paragraph 51, he observed:

> " … in seeking to ensure the payment of excise duty while permitting movement of goods under duty suspension arrangements, it is neither unreasonable nor disproportionate to stipulate that, except in the case where goods are lost due to some *force majeure* event (in which case no liability attaches), a person involved in the movement of goods should be liable for the duty which is unpaid as a result of the goods being stolen in transit or otherwise removed from the duty suspension arrangements as a result of an irregularity. Such a measure is in my view necessary to achieve that purpose. The alternative of fault-based liability would be difficult to enforce and would, in all likelihood, result in the non-recoverability of significant amount of duty. That, at any rate, appears to be the thinking behind the approach taken in the Directive and I can see no basis for saying that this is an unreasonable approach."

38. Secondly, in *B & M Retail Ltd v HMRC* [2016] UKUT 429 (TCC) [2016] STC 2456, the Upper Tribunal (Henderson J and Judge Herrington) allowed an appeal by HMRC from the First-tier Tribunal against a preliminary ruling that there could not be more than one excise duty point under the regulations giving effect to the 2008 Directive so that a person could not be liable for duty if, before he held the goods, a previous identified excise duty point had arisen. The case did not directly involve Article 33 of the 2008 Directive or regulation 13 of the 2010 Regulations. Rather, it concerned the interpretation of, and liability under, Article 7 of the 2008 Directive and regulation 6 of the 2010 Regulations. In the course of its judgment, however, the Upper Tribunal made some observations of some relevance to the present case (at paragraph 118):

> " … in our view *Gross* provides clear authority that once excise goods in respect of which duty has not been paid are circulating within the Member State of the destination then the authorities of that Member State have the ability to choose which of sequential holders of the goods to assess provided that there has not been a prior assessment. This is consistent with the underlying policy of the 2008 Directive … that it is the duty of the Member State concerned to ensure that duty is paid on goods that are found to have been released for consumption. The decision in the case is therefore consistent with the principle that it should be possible to assess a person found to be holding goods in respect of which duty has not been paid even though there may have been a prior release for consumption of those goods within the same Member State, so long as there has been no prior assessment of the outstanding duty."

The Upper Tribunal returned to this interpretation of the underlying policy at paragraphs 148-9:

> "148. … we do not consider that assessing a person found to be holding goods in respect of which excise duty has not been 'levied', in circumstances where it necessarily follows that in principle a prior release for consumption has occurred, is inconsistent with the purpose of the 2008 Directive and its predecessor.

> 149. As a number of the ECJ cases we have referred to above demonstrate, it is clearly the intention of the EU legislature that Member States shall take all necessary steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the EU alongside goods where duty has been paid. That would be a clear distortion of the internal market. If B & M's contentions were correct, then … HMRC would be powerless to prevent that happening if they were unable to detect where, when, how and by whose agency the prior event which B & M contends will necessarily have triggered an excise duty point has occurred. That cannot have been the intention behind the 2008 Directive and its predecessor …."

This led the Upper Tribunal to conclude, at paragraph 155-6, that

> " 155 … once any one of the four events mentioned in article 7 of the 2008 Directive has occurred then it is incumbent on the Member State in question to ensure that the duty is paid. Therefore, in circumstances where it is unable to assess any person who caused a prior release for consumption to occur, it is open to the Member State to assess, in accordance with its own procedures, any person who is found to be holding the goods within the meaning of article 7(2)(b) of the 2008 Directive.
>
> 156. We agree with HMRC that, if B & M's contentions were correct, then, in particular in relation to imported goods, if HMRC were unable to establish how or when the goods concerned were imported, the products would have to go untaxed, even though the person holding them was unable to show duty had been paid. Such a result would be clearly contrary to the objective of the 2008 Directive to ensure that duties properly chargeable are collected."

39. The decision in ***B & M*** was followed by the Upper Tribunal in ***Davison and Robinson Ltd v HMRC*** [2018] UKUT 437 (TCC) (Fancourt J and Judge Herrington). Having cited the judgment in ***B & M*** at some length, the Upper Tribunal added this observation (at paragraph 67):

> " … the need to ensure that unpaid excise duty is collected when goods have been released for consumption requires HMRC, as the UT found in ***B & M***, to make an assessment once it has established that an excise duty point has occurred, Clearly, HMRC cannot make an assessment until it has the necessary information on which to establish when, how, where and by whose acts the excise duty point occurred. Therefore, in the absence of any relevant information in relation to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, since that is the only excise duty point which HMRC is able to establish."

40. For his part, Mr Bedenham, counsel for Mr Perfect, also drew support from an earlier decision of the Upper Tribunal in ***McKeown and others v Revenue and Customs Commissioners*** [2016] UKUT 479 (TCC) [2017] STC 294. McKeown and the two other appellants were all drivers of heavy goods vehicles based in Northern Ireland who were stopped by the United Kingdom Border Force in Dover when returning from Calais and found to be carrying substantial quantities of alcohol. The documents were invalid and, although the appellants all stated that they were merely the drivers and not the owners of the vehicles of the goods, they were assessed by HMRC for

excise duty on the grounds that they had been holding alcoholic products for a commercial purpose when they entered the UK and were therefore liable for the duty under the 2008 Directive and regulation 13 of the 2010 Regulations. On all three appeals, the FtT found that the appellants had not been innocent parties to the importation. They appealed to the UT arguing, *inter alia*, that possession of the goods alone could not constitute "holding" even when combined with guilty knowledge. In dismissing their further appeals, the UT (Judges Bishopp and Sinfield) adopted the interpretation of "holding" as stated by the Court of Appeal Criminal Division in *Tatham* and, in applying the principles in that case to the facts before them, reached the following conclusion:

> "65. There is no question that the appellants had physical possession of the goods but that is neither necessary nor, by itself, enough to constitute 'holding' for the purposes of regulation 13. In order to be 'holding the goods', a person must be capable of exercising *de jure* and/or *de facto* control over the goods, whether temporarily or permanently, either directly or by acting through an agent. In this case, as the tribunals found, the drivers had control over the goods. That was, in our view, obviously correct. The appellants, as drivers, had custody of the goods and were responsible for them during their transportation. The fact that the drivers had obligations to others, who had engaged them to transport the goods, and those others had control over the drivers does not mean that the drivers did not also have *de jure* and *de facto* control, albeit subject to obligations owed to and directions by the others.
>
> 66. A person who has *de jure* and *de facto* control of goods but who lacks both actual and constructive knowledge of them and the fact that duty is payable on them, cannot be said to be 'holding' the goods for the purposes of regulation 13. In these cases, however, it was not disputed that the appellants knew the nature of the goods they were carrying and that they were subject to excise duty …."

The FtT decision

41. The FtT noted that there was no direct authority on the question as to the circumstances in which a lorry driver is liable to be assessed for excise duty where it is found that duty has not been paid on the goods that are being transported in the vehicle he is driving. The tribunal was referred to a number of cases, all concerning appeals against confiscation orders made under the Proceeds of Crime Act 2002 following convictions for tax or excise offences, including *Taylor and Wood*. From those cases, the FtT derived the following principles (set out at paragraph 38 of its decision):

> "(1) A person owning or having legal control of smuggled goods with the intention of asserting control against others, whether temporarily or permanently, is to be regarded as 'holding' those goods for the purpose of regulation 13 of the 2010 Regulations;
>
> (2) Depending on the circumstances, a person having physical possession of smuggled goods, and sharing legal possession of those goods with the person mentioned in (1) above may be regarded as holding them for the purposes of regulation 13;

> (3) An innocent agent of a person mentioned in (1) or (2) above having physical possession of smuggled goods is not to be regarded as holding those goods for the purposes of regulation 13, and
>
> (4) Actual or constructive knowledge of his physical possession of smuggled goods might be sufficient to constitute 'holding' for the purposes of regulation 13 and take such a person outside the status of 'innocent agent'."

42. On the facts of this case, the FtT found, *inter alia*, that HMRC had made no real attempt to find out who owned the vehicle or who was behind the smuggling and that, whilst Mr Perfect was undoubtedly in physical possession of the goods, he had no interest of his own in them, was not part of any conspiracy, and had simply followed instructions. The FtT reached the following conclusions (paragraph 61 to 64 of its decision):

> "61. In our view, insofar as the question of knowledge is concerned, assuming it is relevant to the question of 'holding', the relevant knowledge is not only as to the physical nature of the goods [which] are being carried but also as to whether or not a liability to excise duty has arisen in respect of them … This is consistent with the limited reasoning on this point in *Taylor and Wood*. The only information that Mr Perfect 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. As we have found, he had no means of checking whether the ARC on the CMR had been used or not.
>
> 62. As far as the question of constructive knowledge is concerned, again assuming that it is relevant to the question of 'holding', as we have indicated above there was nothing on the face of the documents to put him on enquiry. It is also difficult to know what enquiries someone in his position could have made. He could not have access to the EMCS system ….
>
> 63. This leaves the question as to whether he should have been put on enquiry by virtue of what HMRC represented were the unusual circumstances in which he came to be engaged by 'Des'. In the world in which Mr Perfect operated these informal arrangements were not to be regarded as unusual …. These sort of arrangements proliferate regardless as to whether they involve the smuggling of alcohol. Consequently in our view the circumstances should not in themselves without any stronger evidence have put Mr Perfect on enquiry as to whether he was going to be involved in the smuggling of alcohol.
>
> 64. We therefore conclude that Mr Perfect should be regarded as an innocent agent in the same way that the hauliers were so characterised in *Taylor and Wood*. That being so, our analysis is equally applicable to the question as to whether Mr Perfect was 'making delivery of the goods' within the meaning of regulation 13(2)(a). As the Court of Appeal observed at [31] of *Taylor and Wood*, to impose liability on Mr Perfect in the circumstances that we have found would raise serious questions of compatibility with the objectives of the legislation."

43. For these reasons, the FtT allowed Mr Perfect's appeal against both the assessment and the penalty.

The Upper Tribunal decision

44. There was no appeal against the FtT's findings of fact. As a result, the appeal to the Upper Tribunal proceeded on the basis that Mr Perfect had neither actual or constructive knowledge of the smuggling attempt. Before the Upper Tribunal, HMRC maintained its primary case that the 2010 Regulations impose strict liability on those who deliver or hold goods, whereas it was argued on behalf of Mr Perfect that the regulations do not impose strict liability at all and, in particular, they do not impose liability on those involved as "innocent agents", a term which extends to those who lack actual or constructive knowledge of the criminal enterprise in which they have become unwittingly involved.

45. Like the FtT, the Upper Tribunal placed considerable reliance on the case law relating to confiscation orders made under the Proceeds of Crime Act 2002, in particular, *Taylor and Wood* and *Tatham*. Although the ultimate issue in those cases had been the validity of a confiscation order, the resolution of that issue had turned on whether the individuals subject to the confiscation orders were, as a matter of law, liable for excise duty. The Upper Tribunal considered themselves bound by the two decisions of the Criminal Division of this Court as to the meaning of 2008 Directive. They attached importance to the observation of Kenneth Parker J in *Taylor and Wood* (at paragraph 31), that "to seek to impose liability to pay duty on [persons] who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents would raise serious questions of compatibility with the objectives of the legislation", and his conclusion (at paragraph 39) that this extended to the objectives of both the Directive and the Regulations. The Upper Tribunal also cited the decision in *Tatham*, in particular the principles set out in paragraph 23 of Sir Brian Leveson P's judgment quoted above, and also the decision of the UT in *McKeown*.

46. The Upper Tribunal then considered the rival submissions as to the meaning of the phrase "innocent agent" at paragraphs 51 to 53 of its judgment:

> "51. The Court of Appeal has considered what those words mean on several occasions. The Court of Appeal recognises that the person can 'hold' the goods for the purposes of the regulations even though he or she has no beneficial interest in them, and even though he or she may not be in physical possession of them, so long as he or she is capable of exercising *de jure* and/or *de facto* control over them, whether temporary or permanently, either directly or through an agent. This is to construe the word 'holding' (and by necessary extension, the word 'delivery') broadly. However, the Court of Appeal has confirmed that the person who lacks actual or constructive knowledge will not 'hold' the goods for the purposes of the regulations. This is to recognise that the broad words are subject to an exception for those who are 'innocent agents'.
>
> 52. Ms Simor [for HMRC] accepts that there is an exception, in line with the domestic authorities. That is, in one sense, to accept that the words of the 2008 Directive do not impose strict liability at all.
>
> 53. The appeal turns on what innocence means in this context. Ms Simor argues that, properly understood, the innocent agent exception only extends to those cases where the agent has no knowledge (actual or constructive) of the *nature* of the goods as excise goods; so, she says, if the agent knows the nature of the

> goods, and specifically that he or she is carrying goods of a kind which is subject to excise duty, then the agent 'knows the risks' and will be fixed with liability, if it turns out that the duty on those goods has gone unpaid. The logical consequence of Ms Simor's argument is that a driver who knows that he or she is carrying excise goods can never be immune from liability for any excise duty which goes unpaid on those goods, albeit jointly and severally liable alongside others who may also be within the scope of the regulations….
>
> 54. Mr Bedenham [for Mr Perfect] challenges that submission. He says that the concept of the innocent agent extends to anyone who lacks actual constructive knowledge of the *criminal enterprise* in relation to the goods (i.e. the attempt to evade tax on the goods), regardless of whether that person knows that the goods he or she is carrying are of a kind which is subject to excise duty in the first place."

47. The Upper Tribunal accepted the submissions on behalf of the appellant and rejected those of the HMRC. It considered itself bound by the decisions of the Court of Appeal Criminal Division as to the meaning of the 2008 Directive, but leaving aside previous authority, it reached the following conclusion (at paragraph 57):

> " … such an interpretation is consistent with the scheme and purpose of the 2008 Directive. We accept, of course, that the 2008 Directive must be interpreted in a manner which complies with EU law principles, including the principles of fairness and proportionality. That is a point echoed by s.1(4) of the Finance (No.2) Act 1992, which permits regulations which specify the person to be liable where the 'prescribed connection' is established, in relation to which this Tribunal is required to have regard to the scope of what the legislature contemplated as a 'fair and reasonable justification' for imposing the liability (see *Taylor and Wood* at paragraph 20). We do not accept that it is fair, proportionate or reasonable to impose liability for evading 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 the fraud is discovered, but without knowledge of what has occurred or is intended, is neither fair nor proportionate. The suggestion by Ms Simor that any unfairness or lack of proportionality in the application of the regime could be mitigated by HMRC, as the taxing authority, exercising discretion in individual cases, does not meet the point: the exercise of discretion in individual cases is not to be confused with the need for a system to be fair and proportionate in its application to all. In any event, HMRC do not intend to exercise discretion in Mr Perfect's favour, so the fact that HMRC has discretion in individual cases does not avail him."

48. The Upper Tribunal therefore dismissed HMRC's appeal in relation to the assessment.

49. With regard to the penalty, the Upper Tribunal noted that the FtT seems to have assumed that the discharge of the assessment necessarily led to the discharge of the penalty, although the parties had in fact agreed that the penalty regime operated independently of the excise duty liability regime. Before the Upper Tribunal, it was submitted on behalf of Mr Perfect that the FtT's decision to discharge the penalty had

been correct, albeit on a basis that was not right in law. The UT was invited to re-make the decision and allow Mr Perfect's appeal against the penalty on two grounds – first, that the FtT's finding that Mr Perfect was an innocent agent was a sufficient basis by itself to conclude that he had not acquired possession of the goods or otherwise dealt with the goods in the manner required by Schedule 41 paragraph 4(1)(a) or, secondly, that the finding that he was an innocent agent provided ample basis for concluding that there was a reasonable excuse for the act or failure involved. The UT accepted the second argument and accordingly allowed Mr Perfect's appeal against the penalty.

Submissions on behalf of HMRC

50. HMRC appealed against the decision of the Upper Tribunal on the grounds that it erred in holding (1) that an individual who was in physical possession and control of excise goods had to have actual or constructive knowledge that excise duty was being evaded in respect of those goods in order to be 'holding' or 'making delivery' of them, within the meaning of regulation 13 of the 2010 Regulations, and (2) that for the purposes of the application of a penalty pursuant to Schedule 41 to the Finance Act 2008, lack of actual or constructive knowledge of the excise status of the goods, or the fact this case are specified by the Upper Tribunal, amounted to a reasonable excuse such that a penalty could not be imposed.

(a) First ground of appeal

51. We were told by Ms Simor that this is the first case in which the Upper Tribunal has held that the driver in physical possession of or delivering excise goods out of duty suspension is not liable for the duty on the grounds that HMRC did not prove that he knew that the goods were being smuggled. Hitherto, HMRC has proceeded on the basis that the law did not require this to be proved. Regulation 13 of the 2010 Regulations was described as a significant tool in the fight against excise fraud. The interpretation adopted by the Upper Tribunal in this case would have a significant impact on HMRC's capacity to prevent the evasion of duty. Although it is open to HMRC to render an assessment of duty under the regulation to the person making delivery of the goods, or the person to whom the goods are delivered, rather than the person holding the goods intended for delivery, experience has shown that a driver may falsely identify the importer or his employer, thereby leaving only the driver himself as an identifiable person on whom liability can be imposed. Strict liability is important not only to ensure that excise duty is paid by someone but also as a deterrence against smuggling.

52. Ms Simor submitted that there is nothing in the language of either the 2008 Directive, or the 2010 Regulations, to indicate that culpability is a prerequisite to liability. On the contrary, she submitted that the purpose of the Directive – as set out in Recital (8) of the Directive and articulated by various courts, including the CJEU in ***Gross*** and also by domestic courts and tribunals on a number of occasions, notably a different constitution of the Upper Tribunal in the ***B&M*** case – required strict liability to be imposed on those carrying excise goods on which duty was payable. She submitted that the imposition of a requirement to show that the individual holding the goods knew not only the nature of the goods but also that excise duty was being evaded in respect of them runs contrary to established law and practice in relation to the excise duties regime, under which strict liability is always applied.

53. In support of this principal submission, she identified four supplementary arguments.

54. First, she submitted that regulation 13 does not contain any requirement for "knowledge". The natural meaning of the words "holding" or "making delivery" of goods does not impute any requirement that the person knows the tax status of the relevant goods in order to be liable for duty owed in respect of them. Had such a requirement been intended, it would have been provided for. Physical possession is sufficient to amount to "holding", for the reasons explained by the Upper Tribunal in *B & M Retail Ltd v HMRC*, *supra*.

55. Secondly, the Upper Tribunal in this case erred in concluding that it had to interpret the concepts of "holding" and "making delivery" so as to confine liability to cases where there was a "fair and reasonable justification" for the imposition of liability. In doing so, the Upper Tribunal wrongly applied the reasoning of Kenneth Parker J in *Taylor and Wood*. That case had concerned the question whether an individual who was not in physical control of the goods could still be said to be holding them so as to incur liability for the excise duty. That was the context for Kenneth Parker J's observation that someone with only a remote connection goods would be outside the scope of what the legislator could have contemplated as a fair and reasonable justification for imposing the liability. Ms Simor submitted that the Upper Tribunal wrongly drew the conclusion that the decision in *Taylor and Wood* precluded the imposition of liability on a person "holding" the goods unless it was a fair and reasonable justification for imposing it and that, unless the person "holding" the goods knew that they were illicit, it would not be fair and reasonable to impose such liability. Ms Simor submitted that such an approach to statutory interpretation is impermissible and that it was not open to the UT to read words into a statutory provision in order to render them "fair and reasonable". The clear intention of the legislator was that physical holding alone could amount to the necessary "prescribed connection" under s.1(4)(a) of the 1992 Act.

56. Thirdly, as is clear from the House of Lords decision in *Greenalls*, strict liability has long been recognised as appropriate under the scheme of the European Directive regime and the consequential domestic regulations. The regulations under consideration in that case, like the later 2010 Regulations, were adopted under s.1(4) of the 1992 Act. The House of Lords found nothing in that Act to preclude strict liability on warehouse keepers. It follows that there is nothing in s.1(4) to prevent the imposition of strict liability on a person "holding" or "making delivery" of the goods.

57. Fourthly, the domestic provisions must be interpreted compatibly with EU law. Unlike its predecessor, the 2008 Directive prescribes not merely the point at which liability arises but also those persons liable for the duty: see recital (8) and Article 8. Given that the purpose of the 2008 Directive is to ensure that excise duty is paid on all excise goods, to read a mental element into the concept of "holding" or "making delivery" is not only unwarranted in terms of the language of the Directive but also undermines its purpose. Ms Simor relied on the decision in *Gross* as support for her submission that the term "holding" is a concept of EU law that must be given a wide interpretation in order to give effect to the object and purpose of the Directive. The Upper Tribunal in this case concluded that, as Mr Gross had been sentenced to imprisonment for his role in the smuggling, and was not therefore an innocent agent, the CJEU's decision did not assist in determining whether someone who is innocent

should be liable for the tax which has been evaded. Ms Simor submitted that the Upper Tribunal erred in failing to follow the guidance given by the CJEU in that case.

58. Before the UT, Ms Simor was obliged to accept that the dicta in *Taylor and Wood* and *Tatham* were, at least, strongly persuasive and arguably technically binding on the Tribunal. On this appeal, however, she submitted that, insofar as the Criminal Division held in those cases that knowledge of the goods and of their illicit nature was a necessary prerequisite to finding that the individual was "holding" or "making delivery" of those goods so as to found liability, it was wrong to do so. The Court in *Tatham* had wrongly interpreted the decision in *Taylor and Wood* as authority for the proposition that a person who lacks actual and constructive knowledge of the duty payable upon the goods cannot be the 'holder'. She added that, in any event, the statements in both cases were merely *obiter*.

(b) Second ground of appeal

59. HMRC submitted that the UT erred in holding that, for the purposes of the application of a penalty pursuant to Schedule 41 of the Finance Act 2008, lack of actual or constructive knowledge of the excise status of the goods amounted to a reasonable excuse such that the penalty could not be imposed. In choosing to base its conclusion on the findings made by the FtT, the UT ought to have taken into account all the findings, including the observation made by the FtT that Mr Perfect had adopted a policy of not volunteering any more information than necessary. Ms Simor submitted that, if the UT is right, a lorry driver can avoid incurring a penalty simply by failing to identify his employer.

Submissions on behalf of Mr Perfect

(a) First ground of appeal

60. Mr Bedenham relied first and foremost on the findings of fact made by the FtT which, he contended, manifestly established that his client was an "innocent agent". He based his submissions on the decisions of the Criminal Division of this Court in *Taylor and Wood* and *Tatham*. He did not accept that the observations of the Court in those cases as to the meaning of "holding" in the Directive and regulation were strictly *obiter* because they were an essential part of the court's reasoning in concluding that no confiscation order should be made in either case. He further rejected HMRC's argument that the Court in *Tatham* had misinterpreted the decision in *Taylor and Wood*, pointing out that Sir Brian Leveson had been part of the constitution of the Court in both cases and he submitted that it was clear from both cases that those who fall within the phrase "innocent agents" cannot properly be said to be "holding" or "delivering" excise goods for the purposes of the Directive and regulation. He conceded that, on the facts in *Taylor and Wood*, neither the haulier nor the sub-haulier knew that the load contained cigarettes, but pointed out that was not the basis upon which the Court reached its conclusions. Rather, the Court indicated (at paragraph 30 of the judgment of Kenneth Parker J) that to deprive a carrier of the protection of an "innocent agent", it is necessary for that carrier to have actual or constructive knowledge that he is carrying such goods *and* that a duty point has been crossed. Mr Bedenham submitted that any doubt as to the proper interpretation of the judgment in that case was resolved by this Court in *Tatham* which put beyond question that a

person who lacks actual or constructive knowledge of either (a) the goods he is carrying or (b) that there is duty payable on them will not be liable as a "holder".

61. Mr Bedenham submitted that the UT in this case had been right to recognise (at paragraph 57 of its judgment) that the approach of the Court in *Taylor and Wood* and *Tatham* is consistent with the scheme and purpose of the 2008 Directive and wider principles of EU law, in particular proportionality and fairness. "Holding" and "delivering" are independent concepts of EU law which must be accorded an EU-compliant interpretation. The 2008 Directive aims to ensure that there is a EU-wide system in place under which excise duties are properly charged and collected, including when goods move between Member States. However, nothing in the Directive suggest that tax should be collected from those who have no interest in the goods that have been moved and who do not know the goods have outstanding duty on them. Mr Bedenham submitted that such an interpretation would not only have the potential to cause commercial chaos but also was neither appropriate nor necessary to secure the aims pursued by the Directive and would therefore be a breach of the principle of proportionality. He relied on the CJEU's interpretation of the VAT Directive in the *Kittel* case cited above as indicative of the proportionate approach to be applied in these circumstances.

62. Mr Bedenham further relied on the terms of Article 38(3) concerning liability in respect of "irregularities during the movement of excise goods". He submitted that the imposition of liability arising out of such an irregularity on "any person who participated in the irregularity" supports his construction of Article 33(3). He contended that the use of the word "participate" indicates that liability should only be imposed on those who have actual or constructive knowledge of the irregularity because the active participation requires some form of conscious act.

63. Mr Bedenham submitted that, insofar as the other decisions of the Upper Tribunal in the cases cited above were of any authoritative weight in this Court, they were distinguishable on their facts. *B & M* and *Davison* both concerned the question whether someone could be liable for duty when there had been an earlier release for consumption. *Butlers* specifically related to the liability of a tax warehouse keeper, who necessarily was in a very different position from a mere haulier, as did the House of Lords decision in *Greenalls*.

(b) Second ground of appeal

64. On this ground, Mr Bedenham submitted that, given the FtT's findings of fact, the UT's conclusion that Mr Perfect had a reasonable excuse within the meaning of paragraph 20 of Schedule 41 is unimpeachable.

Conclusions

65. We have concluded that the first ground of appeal raises a question of EU law which is not *acte clair* and should therefore be referred to the CJEU.

66. We agree that the underlying policy of the 2008 Directive is, as identified by the Upper Tribunal in *B & M*, that it is the obligation of every Member State to ensure that duty is paid on goods that are found to have been released for consumption. It would be a distortion of the internal market were Member States not to take steps to

ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the single market alongside goods on which duty has been paid. As the Upper Tribunal further observed in *Davison and Robinson*, in the absence of any relevant information relating to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, if that is the only excise duty point which can be established. We note HMRC's submission that where, as here, a driver is unable to identify the consignor, or the importer, or his employer, the only person who can be assessed for the duty is the driver himself. If he cannot be assessed in circumstances where HMRC or a Tribunal concludes that he was unaware that the goods were liable to duty, the opportunities for smuggling and fraud are manifestly greater. Accordingly, strict liability appears to have been an accepted feature of the regime under successive Directives, as explained initially by Lord Hoffmann in *Greenalls*.

67. This policy is, to our eyes, reflected in the terms of the Directive and the Regulations. We agree with Ms Simor's submission that the natural meaning of the words "holding" or "making delivery" of goods does not impute any requirement that the person is aware of the tax status of the goods. Although fairness and proportionality are, of course, cornerstones of EU law, as they are of the common law, they do not invariably exclude the imposition of strict liability. We consider that there is very considerable force in the argument that, given the policy underlying the Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality.

68. One view is that the scheme of the legislative provisions, considered as a whole, may draw a distinction between liability for payment of duty and liability for criminal sanctions. Taxing statutes, unlike statutes creating criminal offences, do not usually impose a liability to tax by reference to the state of mind of the taxpayer – what is taxed are usually objective events or transactions without regard to the state of mind of the taxpayer. The public interest in ensuring that excise duty is paid may require that anyone holding the goods is strictly liable for the duty. He or she may have a remedy against the consignors or the importers, provided their identities are known. The imposition of liability on mere couriers would act as a deterrent against a driver getting involved in such a venture without reliable information as to the identity of the person who engages his services. On the other hand, a criminal prosecution for an offence of dishonesty and, arguably, the imposition of a penalty under the tax laws, should require that the driver knew that duty had not been paid on the goods he was carrying. The fact that paragraph 20 of Schedule 41 to the Finance Act 2008 provides a defence to a penalty under paragraph 4(1) where the taxpayer establishes a reasonable excuse, whereas the provisions imposing liability under the 2008 Directive and the 2010 Regulations do not include any such exception, is consistent with this interpretation of the overall scheme.

69. On the other hand, there are two decisions of the Criminal Division of this Court which provide support for the alternative interpretation advanced on behalf of Mr Perfect. In those cases, this Court has decided, albeit in the context of confiscation proceedings, that anyone in physical possession of goods without actual or constructive knowledge of the duty payable on them cannot be a "holder" within the meaning of the 2008 Directive or the 2010 Regulations. We accept Mr Bedenham's submission that the observations as to the meaning of "holder" in *Taylor and Wood*

and ***Tatham*** are not *obiter* since in each case they were a factor in the decision whether or not to impose a confiscation order. It was the clear view of the members of this Court in those cases that to seek to impose liability on entirely innocent agents would not promote the objectives of the Directive or the Regulations. That view was plainly shared by the judges of the Upper Tribunal in the present case when they concluded (at paragraph 57 of the judgment) that "to impose liability on drivers simply because they are in possession of goods at the time the fraud is discovered, without knowledge of what has occurred or is intended, is neither fair nor proportionate".

70. Given the fundamental importance of proportionality in EU law, it is certainly arguable that, had there been any intention to impose strict liability in the 2008 Directive, it would have been expressly stated.

71. Accordingly, in these circumstances, we have concluded that the issue is not *acte clair*. We propose, therefore, to refer the following questions (the drafting of which has been agreed between the parties) to the CJEU for a preliminary ruling:

    (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 the goods had become chargeable to excise duty in the 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?

72. The appeal on the first ground will therefore be adjourned pending determination of the reference by the CJEU.

73. We do not, however, consider that the decision to refer the issue arising on the first ground of appeal prevents us determining the second ground. In our view, the decision of the Upper Tribunal was plainly correct. The facts as found by the FtT included:

    (1) that Mr Perfect had no interest of his own in the goods, was not part of any conspiracy, and had simply followed instructions;

    (2) that the only information that he had was to be found in the documentation he collected when he picked up the goods;

    (3) the documentation appeared to be consistent with the movement of goods subject to a valid duty-suspended arrangement; and

(4) Mr Perfect had no means of checking whether the ARC on the documentation had been used or not.

In our judgment, those facts as found by the FtT entitled the Upper Tribunal to conclude that Mr Perfect was an innocent agent. In the light of those findings, the Upper Tribunal was plainly entitled to conclude that his action in bringing into this country goods on which duty had not been paid was plainly not "deliberate" within the meaning of paragraph 20 of Schedule 41 to the 2008 Act and, furthermore, was plainly capable of giving rise to a reasonable excuse under that paragraph.

74. HMRC's appeal against the Upper Tribunal's decision to set aside the penalty imposed under Schedule 41 paragraph 4(1) is therefore refused.