



TC01360

Appeal number: LON/2009/8003

Excise Duty – Duty Suspension – Diversion from authorised warehouse – Liability of owner – Assessment to excise duty on movement of duty suspended alcohol – Whether Appellant caused the occurrence of an excise duty point – Yes – Whether revocation of Appellant’s registration as Registered owner of Duty Suspended Goods was reasonable – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

**ALI MALEEK T/A
EUROWORLD DISTRIBUTION SERVICES**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: DR K KHAN
JOHN AGBOOLA FCA**

Sitting in public in London on 9-11 May 2011

The Appellant in person

Mr Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

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1. The Appellant is appealing against two matters, which are:

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1. An assessment of excise duty, reference EXA 250/08, for £100,694 issued on 24 June 2008 (appeal LON/2009/8003) (“the Excise Appeal”); and

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2. The Respondents’ decision of 6 June 2008 (which is deemed to have been upheld on 3 August 2008) to revoke the Appellant’s registration as a registered owner of goods in warehouse under section 100G of Customs and Excise Management Act 1979 (“CEMA”) (LON/2009/8004) (“the Registration Appeal”).

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2. Pursuant to a direction made by the Tribunal on 16 December 2008 the two appeals were consolidated under reference number LON/2009/8003.

Preliminary Issue

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3. The Appellant sought an adjournment of the hearing on the morning of 9 May. The Tribunal felt that the Appellant has sufficient time to prepare his appeal. In particular, he had approximately nine months to prepare since his last, similar request for an adjournment on 10 August 2010. The Appellant had failed to respond to the Respondents’ enquiries for information and had not cooperated with the Respondents in preparing the appeal for the hearing. He had not provided any satisfactory explanation to the Tribunal. It was felt that in the interest of justice and fairness the matter should proceed expeditiously.

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The Parties

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4. The Appellant was at all material times a wholesaler of goods, including alcohol. He was also the owner of goods in the warehouse within the meaning of Regulation 5 of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 (“the 1999 Regulations”).

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5. At all material times, the Appellant was entitled to store goods in an excise warehouse (within the meaning of section 4(3) of the Alcoholic Liquor Duties Act 1979 and section 1(1) of CEMA.

The Transactions

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6. The assessment of Excise to which the Excise Appeal relates was issued by the Respondents in order to recover the Excise Duty due on a consignment of 1144 cases of Glens Vodka (“the Goods”). The Goods were removed from Euro sellers Ltd,

Euro, Trade Centre, Crabtree, Manorway, North Belvedere, Kent DA17 6AZ (“the English Warehouse”) and purportedly transported at a warehouse in Lauvie Distribution, Chemin Mas Des, Moines 30340, Mejanne, Les Ales, France (“the French Warehouse”).

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7. The English Warehouse and The French Warehouses were both tax warehouses within the meaning of Article 4(b) Council Directive 92/12/EEC (“the Directive”).

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8. Under section 5 of the Alcoholic Liquor Duties Act 1979, the Goods were subject to a duty of excise. Accordingly, the Goods were excise goods within the meaning of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 (“the 2001 Regulations”).

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9. The amount of duty of excise to which the Goods are subject was £100,694. As of 18 December 2007 the duty was suspended under Excise Duty Suspension arrangements.

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10. The Appellant purported to consign the Goods from the English Warehouse to the French Warehouse. Both are authorised warehouses within the meaning of Article 4(a) of the Directive and Regulation 2 of the 2001 Regulations. In the circumstances, no duties would be payable on the transfer from one bonded warehouse to another.

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11. On or around 18 December 2007, the Appellant removed the Goods from the English Warehouse. At approximately 10.00am the following day, using a vehicle with registration number JJ2 4704, purportedly transported the goods by Eurotunnel to the French Warehouse. The transportation of the goods were undertaken by hauliers, Sam Leach Transport.

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12. The Appellant, through its employees and contractors, submitted documents to the Respondents regarding the transport of the Goods. In particular, the Appellant, on 18 December 2007, submitted a document that accompanied the Goods during the export, known as an Administrative Accompanying Documents (“AADs”). In this document, the Appellant stated that the Goods were to be exported that day, using vehicle registration JJ2 4707. In the AAD, Box 9 stated that the transporter of the goods were Sam Leach Transport. The vehicle carrying the goods was identified in Box 9 as JAZ 4704 with trailer 126. In Box 10, the movement guarantee for the goods was provided by the owner of the goods, who was the Appellant. In Box 11, under the heading “other transport details”, it was stated “For: Eriks Diffusion SL” and “Ex EuroWorld Dist. SVS”. The Appellant’s customer was Eriks Diffusion SL and Euroworld Distribution Services is the Appellant’s trading name.

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13. On 21 December 2007, vehicle JJZ 4704 was stopped when entering the Channel Tunnel from France. Subsequent enquiries by the Respondents revealed that the vehicle had been X-rayed by Eurotunnel on its outward journey on 19 December 2007 and that the X-ray showed that the vehicle was empty at the time. This is

confirmed in the witness statement of HMRC officer Lisa Pask. The Euro scan X-ray, (provided as part of the witness statement of Ian Currie) showed that vehicle JJZ 4704 was empty at 11.41am (Central European Time) on 19 December 2007 as it travelled from the UK to France and was noted to be empty at check-in.

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14. The haulier, Sam Leach Transport, confirmed that no trailer swaps for vehicle JJZ 4704 had taken place. On the basis of the information in the AAD, the trailer of vehicle JJZ 4704 should not have been empty when the vehicle left the UK on 19 December 2007. It should have contained the Appellant's excise goods.

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15. The Goods were loaded in the trailer on 18 December 2007. The Respondents say that the Goods were no longer in the trailer when it arrived at the Eurotunnel site on 19 December therefore an irregularity in the movement of goods occurred in the UK.

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16. The Respondents outlined certain factors which point to an irregularity occurring in the UK. These are:

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(a) While the goods were loaded into the trailer of vehicle JJZ 4704 on 18 December, the vehicle did not arrive at Eurotunnel site until the morning of 19 December 2007, which would have allowed time for the goods to be unloaded and diverted within the UK.

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(b) While the claimant claimed the goods were destined for a customer in Spain, the customer does not appear to be genuine. The customer company call Eriks Diffusion SL with an address in Sant Pere, Pescador, Spain did not seem to exist. There is a company in Spain called Eriks Diffusion SL. This is an industrial machinery and equipment company not dealing in alcohol and has a different address to that on the purchase order. The Respondents say that this company did not provide the purchase order.

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(c) The Appellant purported to communicate with the alleged purchaser of the goods using a false name "Luke Bux".

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(d) The goods purported to arrive at the warehouse in France on 20 December 2007. The Respondents say since the trailer of the vehicle was empty on the outward journey from UK to France, no goods were delivered.

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Documents

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17. The Tribunal was provided with two ring binder bundles. The first contained all correspondence and related documentation. The second the witness statements of officers Lisa Pask and Ian Joseph Currie and the witness statement of Sean James Powell, who was employed as the Security and Certification Leader at Eurotunnel Group, Folkestone, Kent. All witnesses gave oral evidence including Mr Ali Maleek. The Tribunal was also provided with additional information including the tachograph

for the vehicle for the period 19 December 2007 to 20 December 2007 showing the vehicle's movement and a Eurotunnel check-in time document, which showed the time the vehicle was checked-in to the Eurotunnel area.

5 18. The Tribunal asked the Appellant to provide further information relating to the Eurotunnel scanning tachograph and other evidence to support his case. He was given 30 days in which to do so. He was also asked to provide confirmation that he had been paid by his customer. The Appellant made some further representations.

10 Appellant's submissions

15 19. The Appellant disputes whether the scanning exercise performed at Dover on 19 December 2007 can be relied upon by the Respondents. He said that the time of the scan, the speed of the vehicle at the time of scanning and the identification of the vehicle were defective.

20 20. The Appellant relies on the tachograph (taken from the Vehicle) which showed that "the Vehicle was not scanned on 19 December 2007 at 10.41.06" since the tachograph "clearly indicated that at 10.40am the vehicle was travelling at approximately 38kmh a whole minute before the so-called scan finished". The Appellant draws the conclusion that the Tachograph "contradicts the scan".

25 21. Secondly the Appellant says that there were no irregularities associated with the shipment of goods and from all the evidence it was properly delivered to the warehouse of the destination in France from which the authenticated Form AAD was returned.

30 22. Thirdly the Appellant says that he has been trying to obtain a witness statement from the haulier, Sam Leach Transport, but has been unable to do so. He said that Mr Leach confirmed to him that the driver never agreed that the vehicle was scanned. He said that that day log from the hauliers indicated that the vehicle has not been scanned and given that the driver has never informed the haulier of the scanning the travel log of the vehicle has never shown there to be a scan of the vehicle. He therefore refutes that the Vehicle was scanned as represented.

35 23. Fourthly, the Appellant says that the examining HMRC officers have never confirmed to the French Customs whether the goods did arrive at their destination. He said that if this check had been made it would have been found that the goods did arrive at their destination. The AAD Custom documents was signed and sealed by the warehouse in France which confirmed delivery. The CMR document was also signed
40 by the receiving warehouse in France, which confirmed delivery of the goods to the warehouse.

45 24. The Appellant also said that after providing a photocopy of the Tachograph to the company Nova Data, a company involved with tachograph analysis, they concluded that the vehicle had not been scanned in December 2007 at the time given.

They however required an original tachograph which the Appellant was unable to provide for further forensic analysis.

5 25. In spite of the Tribunal having given the Appellant forty days to provide further evidence, the Appellant was not able to provide the relevant tachograph information, a witness statement from Sam Leach Transport, details from Eurotunnel on the scanning times and rest area details and confirmations.

10 Respondents' arguments

15 26. The Respondents say that there was an irregularity occurring with regards the Goods in that they did not arrive at the designated warehouse in France and the movement described on AAD could not have been discharged because the trailer of the vehicle carrying the Goods was empty on its outward journey from the UK to France.

20 27. Secondly they say that the irregularity occurred in the UK and as such an excise duty point arises in the UK by law. The Appellant who was a person shown in the AAD as the guarantor, was therefore liable to pay the excise duty.

25 28. Thirdly the Respondents say that the scanning procedure which took place at the Port of Dover was in order and not faulty and the scan showed that the Vehicle was empty at the time it was travelling from the UK to France. The hauliers confirmed that there was no trailer swaps and therefore the trailer of the Vehicle should not have been empty when it left the UK on 19 December 2007, but should have contained the Appellant's excise goods.

30 29. The Respondents say that the Appellant has not discharged the burden on him to show that there was not irregularity with regards to the movement of goods. They say that the argument by the Appellant that the tachograph showed that the Vehicle could not have been scanned at the time stated cannot be relied upon. The Respondents say that the tachograph carries little weight since it depends on whether it had been properly calibrated at the start of the journey and as such the information in that tachograph is not reliable.

35 30. The Respondents also say that the stamp showing the arrival of the Goods in France was not a Customs' stamp and therefore the AAD documents which were completed purport to show that the Goods arrived at their destination but in fact they were fraudulently diverted in the UK.

40 31. The Respondents say that the most compelling evidence of the empty vehicle are the scans provided to the Tribunal. These clearly show that the Vehicle, on leaving the UK, was empty of its cargo.

45 32. Finally, the Respondents submit that the decision to revoke the Appellant's registration as a registered owner of duty suspended goods was reasonably arrived at

and it was not unreasonable for the Respondents to conclude that the Appellant was involved in non-compliance with the excise duty regime.

The Law

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33. The law in this area is well rehearsed and for all purposes we will state them briefly.

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34. Article 20(1) of Council Directive 92/12/EEC provides;

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“Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3) ...”

35. Where an irregularity occurs in the UK, an excise duty point arises under Regulation 3(2) of the 2001 Regulations. Regulation 7(1) provides:

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“... where there is an excise duty point as prescribed by Regulation 3 or 4 above, the person liable to pay the excise duty on the occurrence of that excise point shall be the person shown as the consignor or on the accompanying administrative document or, if someone other than the consignor is shown in Box 10 of that document as having arranged for the guarantee, that other person”.

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36. The Respondents revoked the Appellant’s registration as a registered owner of Duty Suspended Goods under Section 100G(5) CEMA which provides:

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“The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section”.

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37. Lastly, Section 16(4) Finance Act 1994 allows the Tribunal to interfere with the Respondents’ decision if it is satisfied “that the Commissioners or other person making that decision could not reasonably have arrived at it”.

Witness Statement of Lisa Pask

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38. Lisa Pask is a Higher Officer, HMRC. Previously she worked in the Alcohol Strategy Team dealing with excise fraud by alcohol traders. As part of her duties, she investigated diversion of excise goods from compounded warehouses. She investigated this matter and found the following:

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1. On 18 February 2008 the Appellant provided officer Pask with two AAD documents numbered AAD/2007/138 and AAD/2007/139. The AADs bears the name “Eriks Diffusion

SL”. Both related to the removal of alcoholic goods (Vodka) from the UK and were transported by Sam Leach Transport using vehicle JJZ 4707 with trailer 126.

- 5 2. Vehicle JJZ 4707 was ex-rayed by Eurotunnel on 19 December 2007 and the x-ray showed the vehicle was empty when it left the UK on 19 December 2007.
- 10 3. The Officer conducted a Dunn & Bradstreet report on the company Eriks Diffusion SL which was found to be a Spanish company which traded in industrial machinery and equipment and which had an address different to that given in the purchase order provided by the Appellant.
- 15 4. The Appellant also provided a communication between themselves and Eriks Diffusion SL which purported to use the name Luke Bux which Mr Maleek confirmed was a pseudonym he had used to avoid identity theft.
- 20 5. The Appellant was unable to explain why the vehicle carrying the goods was empty when it was scanned at Dover. He was subsequently issued with an assessment for £100,694 in excise duty and £17,621 in VAT in respect of the purported consignment to Eriks Diffusion SL on 19 December 2007.

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Witness Statement of Shaun James Powell

39. Mr Powell is the Security and Certification Leader with Eurotunnel Group, Folkestone Kent.

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40. Mr Powell made the following points:

- 35 1. His job is involved with freight and passenger security and in the scanning of vehicles to ensure safety and security of passengers and freight carried across the Tunnel. He explained the procedure for scanning vehicles. The main points are;
- 40 (a) A vehicle is selected for scanning and once the scanning has been completed certain information relating to vehicle is entered into a database. This includes the company name which the driver gives the operator, the load which the driver gives the operator, any comments made by the operators. The scan is then identified with those details. The x-ray scanner operator is not involved in the interrogation of the x-ray image.
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- (b) Once the image is on screen, the operator interrogates the scan to identify any security risks such as gun, knives and other weapons or explosives. The average time taken to scan the vehicle is seven minutes and an empty vehicle may take four or five minutes.
 - (c) The electronic images produced by the scanning system are kept on an image database.

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- 2. He confirmed that the whole system runs on Central European time which is roughly one hour ahead of the UK time. The time of the scan will be shown on the scan when completed.
 - 3. He said the correct procedure for scanning the vehicle had been complied with in this case.
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41. The tribunal was provided with a photocopy of the scan results which show that the Vehicle was empty and a report numbered ET-F12500 again confirming that the vehicle was empty at the time and it was crossing over into France.

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Witness Statement of Ian Joseph Currie

42. An Investigating Officer HMRC who worked on the Revenue Fraud Detection Team.

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43. He made the following points to the Tribunal:

- 1. He confirmed that the AADs showed that the Goods were cases of Vodka being transported to France.
 - 2. He confirmed that the lorry had been sealed with a seal number 3580283 which means that the lorry has a unique tamper approved seal secured to the trailer, the purpose of which was to ensure that the load could not be tampered with or removed without breaking that seal.
 - 3. He confirmed that the scan showed that the lorry in question Vehicle number JJZ 4707 was empty. The vehicle had been checked in at 09.14 hrs and the scan was on the document 11.41hrs. These are Central European times.
 - 4. The vehicle was intercepted on its return journey from France on 21 December 2007. The driver handed over a CMR for the outward bound journey on 19 December which showed an international consignment note showing details of the movement of goods which was 1144 cases of Vodka which were exported by Euroworld Distribution to Lauvie
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Distribution in France using Sam Leach Transport – Vehicle JJZ 4704, trailer 126 and seal number 3580283 on 18 December 2007. It also appeared to show that the goods were received by the French warehouse on 20 December 2007. This all accords with the AAD 2007/139.

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44. All three witnesses gave oral evidence which were examined by both the Appellant and the Respondents.

10 Findings of Facts

45. The Tribunal finds the following:

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1. The Vehicle JJZ 4704 was empty at the time it was scanned and this is confirmed by the scanning photograph presented to the Tribunal.

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2. There is no evidence to show that the Goods arrived at their destination and the stamp on the AADs was not a stamp of the French Customs.

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3. The scan which took place at Dover was properly undertaken and there is no evidence to suggest that this is not the case.

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4. The customer listed as Eriks Diffusion SL was not the company which showed up on the HMRC Dunn & Bradstreet report.

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5. It is unusual that the Appellant did not conduct any checks given that their movement guarantee was being used to guarantee these goods.

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6. The Appellant confirmed that he used a false name Luke Box in communicating with the customer and in providing a proforma invoice.

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7. The Vehicle did have a security seal. However, the Tribunal was unable to confirm whether the vehicle was full or empty at the time the seal was attached.

8. The Tribunal is also unable to confirm whether the tachograph was properly calibrated and set with the correct time and journey details and therefore the information in the tachograph cannot be considered to be reliable.

Discussion

46. The Tribunal must decide whether an excise duty point arose in the UK and whether the Appellant is liable for the duty and secondly to decide whether the
5 revoking of the Appellant's registration as a registered owner of duty suspended goods was reasonable.

47. Let us look at the first question, which is whether an excise duty of point arose in the UK. In looking at this question the Tribunal is fundamentally looking to see
10 whether an irregularity occurred in the UK with regard to the transportation of the goods.

48. The assessment is of excise duty for the recovery of duty on a consignment of 1144 cases of Glens Vodka. According to the AADs, the goods were removed on 18
15 December 2007 from Eurocellars Ltd in Kent and sent to the warehouse Lauvie Distribution in France. Box 9 of the AADs stated that the transporter of the goods were Same Leach Transport. The vehicle carrying the Goods was identified in box 9 as JJZ 4704 with trailer 126. In Box 10, the movement guarantee for the goods was provided by the owner of the goods, who was the Appellant. In Box 11 the customer
20 was listed as Eriks Diffusions SL. These facts were confirmed earlier.

49. On 21 December 2007, vehicle JJZ 4704 was stopped as it entered the Channel Tunnel from France. It was revealed that the vehicle had been x-rayed by Eurotunnel on its outward journey on 19 December 2007 and the x-ray showed that
25 the vehicle was empty at that time. This is confirmed in the witness statement of both Lisa Paske and Ian Currie both officers of HMRC. The scan was conducted at 11.41 (Central European Time) on 19 December 2007 as it travelled from the UK to France, The records indicate that the vehicle was empty which was confirmed in report ET-F12500. The Tribunal had sight of the scan pictures. The haulier, Sam Leach
30 Transport, confirmed that there was no trailer swap for vehicle JJZ 4704 and on the basis of the information in the AADs, the trailer of vehicle JJZ 4704 should not have been empty when the vehicle left the UK on 19 December 2007. There is clear evidence that the goods were loaded on to the trailer of vehicle JJZ 4707 on 18 December 2007. Given these facts, the Tribunal finds that there was a clear
35 irregularity in the movement of the goods.

50. There are other factors which also point to an irregularity.

51. If one looks at the time frame between when the goods were loaded on to the
40 vehicle at midday on 18 December 2007 and its arrival at the Eurotunnel site on the morning of 19 December 2007, there was sufficient time for the goods to be unloaded and diverted within the UK. The Appellant claimed that the goods were destined for a customer in Spain, but the Tribunal does not believe that was correct. The Appellant produced purchase orders for the goods from "M. Eriks" who purport to be a director
45 of Eriks Diffusion SL with an address in Spain. However, the real Eriks Diffusion SL trades in industrial machinery and equipment, not in alcohol and has a different address to that on the purchase order. This was confirmed by officer Pask in her

witness statement and supported by a report from Dunn & Bradstreet. The purchase order therefore in the circumstances was clearly false and it is questionable whether the Company listed in the AAD existed or had made an order for goods to the Appellant.

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52. The Appellant in communicating with the purchaser who had used a false, Luke Bux. The Appellant suggested to the Tribunal that this was to protect against identity theft. This was a very strange way of protecting oneself against identity theft. Officer Pask who has been an officer with HMRC for over twenty years noted in her witness statement that “this is the only case in which I have ever encountered the business using a pseudonym”. It does seem strange to the Tribunal that this form of trading with a fictitious company should be done by a person using a pseudonym and not their real name. The circumstances, on a balance of probabilities, point to an irregularity.

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53. The AAD indicates that the goods were received in the warehouse in France on 21 December 2007. However, the movement described on the AAD could not have been discharged because the trailer and the vehicle were empty on its outward journey from the UK to France as confirmed in the photocopy of the scan given to the Tribunal. This was conclusive evidence. There is nothing to suggest that the scanning procedure operated by Eurotunnel Ltd was in any way defective or the timing given on the scan was incorrect. Certainly, the Appellant did not satisfy the burden to prove that there was no irregularity in the UK and he has produced little or no evidence to show that the Euroscan x-ray, which shows that the trailer was empty before it left the UK, was in any way defective. He had asked for more time and the Tribunal gave him an additional forty days to present further evidence. However he was not able to provide any further evidence in that period and requested even more time. In the circumstances, the Tribunal felt that forty days were sufficient given that the appeal had been started some years earlier and there was no information forthcoming during that period.

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54. The Appellant had guaranteed the payment of excise duty on the goods and he was therefore liable to pay the duty in the event of an irregularity pursuant to Article 20 of Council Directive 92/12/EEC. Where that irregularity occurs in the UK, an excise duty point arises under Regulation 3(2) of the 2001 Regulations. The Appellant is clearly stated in box 10 of the AADs to be the guarantor and therefore he is liable to pay the excise duty under Regulations 7(1) of the 2001 Regulations.

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55. With regard to the revocation of the Appellant’s registration as a registered owner, the Tribunal finds that there was reasonable cause in the circumstances to revoke the registration. The Appellant was the owner of the goods that were loaded onto the trailer vehicle JJZ 4704 on 18 December. He could not provide a reasonably satisfactory information for the whereabouts of the goods and an explanation of why they had not arrived at their destination. There is clear evidence to suggest that the customer did not exist and the Appellant himself had used a false name when communicating with the customer. In the circumstances, the Respondents acted

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reasonably in withdrawing the registered owner of duty suspended goods from the Appellant.

56. The Tribunal also find it quite surprising that the Appellant had not carried on proper checks when he had few previous dealings with the customer and his movement guarantee was being used. There were obvious discrepancies in the information provided and a simple check would have revealed that the customer company was not what it was represented to be. Further, the use of a pseudonym by the Appellant is unusual and unexplained. It was suggested that the Appellant did not believe or trust the customer with whom he was dealing and therefore did not give his real name. If the Appellant did not trust the customer then there was more reason to conduct checks on their background and trading history. It is not satisfactory that he said that he “took risks” in dealing with the customer.

57. The Respondents must protect themselves against situations where there could be a loss of revenue and this certainly was one of those cases. They acted reasonably in the circumstances.

Conclusion

58. The Tribunal would therefore find that the appeal should be dismissed. The excise duty assessment was correct and the revocation of the Appellant’s registration as a registered owner was reasonable.

59. There are no issues of costs in this case but if there are this can be raised separately at a different hearing.

60. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

DR K KHAN
TRIBUNAL JUDGE
RELEASE DATE: 28 July 2011