



**TC04028**

**Appeal number: TC/2013/01630**

*Excise Duty - whether Appellant was 'holding' goods and whether the Appellant was in 'possession' of goods' or 'concerned in the keeping or otherwise dealing' with goods on which excise duty was due - yes - whether penalty payable - yes - appeal disallowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MOHAMED MOBARAK**

**Appellant**

**- and -**

**DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: JUDGE MICHAEL S CONNELL  
MRS BEVERLEY TANNER**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 27 May 2014**

**The Appellant appeared in person**

**Ms Elaine Caine Officer of HMRC for the Respondents**

## DECISION

1. Mr Mohamed Selim Shahata Mobarak (“the Appellant”) appeals against the Commissioners' decision on review dated 31 January 2013, to assess the Appellant for excise duty in the sum of £2,568 and to issue a penalty in the sum of £898, following a seizure of tobacco from the Rusholme Convenience Store, “the store” on 20 October 2011 (‘the first decision’ - TC/2013/01630).
2. The Appellant also appeals the Commissioners' decision on review dated 29 May 2013, to assess the Appellant for excise duty in the sum of £2,033 and to issue a penalty in the sum of £711.55, following a seizure of tobacco from the Rusholme Convenience Store on 9 September 2011 (‘the second decision’ - TC/2013/04839).

## BACKGROUND

3. The Rusholme Convenience Store, at Grandale Street, Manchester, M14 5WS, was registered for Value Added Tax on 1 October 2008 by the Appellant. At the date of the seizures there had been no alteration to the status of the business following registration.
4. On 9 September 2011 UKBA/HMRC Officers, Taylor, Bailey, and Bhaseen visited the Rusholme Convenience Store. The Appellant, who gave his name as Mohamed Selim, his date of birth as 27 October 1968 and his address as 45 Cherrington Drive Manchester, was the only person present.
5. During a search of the store Officers located 1,400 Marlboro cigarettes and 20.5kg of mixed fruit tobacco behind the counter.
6. Officer Taylor interviewed the Appellant under caution. When asked who the cigarettes belonged to the Appellant said that they were dropped off at the shop by random people, “mainly travellers” and he sold them.
7. Further questions were asked about the non UK duty paid tobacco products held out for sale and the following information was obtained:
- The cigarettes were sold for £4 and £3 depending on the customer;
  - The fruit tobacco was bought from London and paid for in cash;
  - The fruit tobacco was sold for £3.50 and £35 for 1000g;
  - There were receipts for the fruit tobacco but they were 'somewhere'.
8. The Officers decided that the following factors indicated that duty had not been paid on the 1,400 cigarettes and 20.5kg of fruit tobacco found in the store:
- Concealment of the goods behind the counter;

- The goods did not bear the required duty markings or health warnings which indicate the legitimacy of goods;
- The prices stated as selling prices were below the duty rates and were not consistent with duty paid stock prices.

5 9. The HMRC Officers took seizure action against the goods in the presence of the Appellant ('the first seizure'). A Seizure Information Notice (Form C156) was provided to the Appellant and he was informed that the seizure had been made without prejudice to any further action HMRC may decide to take. The Appellant signed Officer Taylor's notes and a form C156. Although he was required to write his name in block capital letters, the name is indecipherable.

10 10. On 22 October 2011 UKBA/HMRC Officers Bailey, Flood and Owen visited the Rusholme Convenience Store.

15 11. Mr Zater Raja and Mrs Sabina Raja were present in the store. They confirmed their names and provided the Officers with their address and dates of birth. Both Mr and Mrs Raja told the Officers that their occupation was "shop worker".

12. During a search of the store Officers located 5580 non duty paid cigarettes and 17.7 kg (estimated) of unpackaged and packaged non duty paid fruit tobacco as follows:

- 2400 Marlboro (Saudi) from behind the store's outside shutter;
- 20 • 800 Marlboro Light, 800 Marlboro Reds and 800 Goldleaf in a bin bag behind the counter;
- 60 Counterfeit (B + H), 300 Marlboro lights, 80 L + M Red and 20 Marlboro Red behind the counter in carrier bags;
- 220 Marlboro Red found in further bag;
- 25 • Estimated 6 kg of unpackaged fruit tobacco (signed by Mr Rajar);
- 3.5 kg of packaged fruit tobacco behind the counter;
- 8.2 kg of packaged fruit tobacco in storage area above the shop.

13. Questions were asked about the tobacco products held out for sale and the following information was obtained:

- 30 • The cigarettes were sold for £4 and £3;
- The cigarettes were bought for £25 to £35 for 200;
- The cigarettes came from people who came to the store and sold them - this was because there was no place to go and buy them;

- The fruit tobacco came from the same people who sold the cigarettes - Mr Raja did not know how much was paid for this tobacco saying 'the boss doesn't tell us';
- There were no invoices for the fruit tobacco.

5 14. When Officer Bailey was asked why the cigarettes had been hidden behind the counter Mr Raja said that 'they had been on display but not now'.

15. . When asked who the tobacco belonged to, Mr Raja said it was the owner - 'Mohamed Mobarak'. Mr Raja stated, about himself and Mrs Raja, that 'we are just helping the boss'. When asked how much was paid for fruit tobacco Mr Raja said 'I don't know. The boss doesn't tell us'. The boss in this regard had previously been identified as the Appellant, Mohamed Mobarak. The answers given during the seizure therefore indicated to HMRC that the store and all its stock belonged to the Appellant

15 16. The Officers decided that the following factors indicated that duty had not been paid on the 5580 cigarettes and 17.7 kg (part estimated) fruit tobacco found in the store:

- Concealment of the goods in various places;
- The goods did not bear the required Duty markings or health warnings which indicate the legitimacy of goods;
- The prices stated as selling prices are below the duty rates and were not consistent with duty paid stock.

17. The Officers took seizure action against the goods in the presence of Mr Raja ('the second seizure') and a Seizure Information Notice (Form C156) and a Warning of Liability to Prosecution letter were provided to him. Mr Raja signed the notes of Officer Bailey to validate that they were a true account of the interview.

25 18. On 1 May 2012 HMRC wrote to the Appellant and issued an assessment to the Appellant (at 1 Grandale Street Manchester) in respect of the second seizure for the amount of £2,568 which was the excise duty payable on the tobacco and informed the Appellant that he was liable to a penalty of £898 for handling goods subject to unpaid excise duty.

30 19. HMRC's letter informed the Appellant that under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, he was liable to pay excise duty on the goods seized from him by virtue of regulation 6 (1) (b) of the 2010 Regulations.

35 20. The Appellant was informed by HMRC that on this occasion it had been decided not to institute criminal proceedings against him, but that in accordance with schedule 41 of the Finance Act 2008 he was liable to a penalty for handling goods subject to unpaid excise duty.

21. On 15 January 2012, HMRC seized non-duty paid tobacco from the residential premises of Mr Zafer Raja and Mrs Sabina Raja. Mr Raja told Officers of HMRC that the tobacco was for the Rusholme Convenience Store, owned by the Appellant. Further Mr Rajar stated that the tobacco belonged to the Appellant and was being kept at their premises because they (Mr Raja and Mrs Raja) worked at the shop. Mr Raja said that the shop took between £400 and £600 per day.

22. On 11 June 2012 the Appellant called HMRC Debt Management Unit in response to a demand for the payment of the assessment. The Appellant claimed that at the time of the visits by HMRC he was only the landlord and had no connection with the business. He said that a previous tenant, Mrs Rashid, had left due to poor trade and he had very reluctantly taken back the business. Mrs Raja was not mentioned in the conversation. He was asked to provide a copy of the tenancy agreement with Mrs Rashid and her contact details. He failed to do so.

23. By letter dated 5 July 2012 the Appellant informed HMRC that Mrs Raja was responsible for the purchase and sale of stock on the premises. The Appellant claimed that Mrs Raja admitted responsibility for the goods seized on 20 October 2011. He does not suggest in this letter that Mrs Raja admitted responsibility for the goods seized at the first seizure. He added that he was running his own business in Oxford Road Manchester.

24. The Appellant with his letter of 5 July 2012, enclosed a letter from Mrs Raja, which said:

“I have been asked by Mr Mobarak to contact you regarding the above matter. I was issued a seizure information notice on 22<sup>nd</sup> of October 2011 and was told that there will be no further action. However, if there is any additional information required from me I will be more than happy to provide it.”

The letter was unsigned.

25. On 11 July 2012 HMRC issued a 'penalty explanation' letter which informed the Appellant of the penalty of £988 (in respect of the second seizure), that would be charged and how it had been calculated. The Appellant was asked to supply any relevant information which he believed had not been taken into account in calculating the penalty.

26. On 30 July 2012 the Appellant wrote to HMRC and appeared to accept liability, stating that everything in the business was in his name, that he had no evidence to support the allegation but if he managed to find any he would forward it on.

27. On 9 August 2012 HMRC informed the Appellant (1 Brideoak Street Cheetham Hill Manchester) of the liability to pay excise duty on the goods seized in the first seizure and that he was the person liable to pay that duty. The Appellant was also informed that he was liable to a penalty for handling goods subject to unpaid excise duty.

28. The Appellant attended for interview on 28 August 2012. The interview was conducted by Officers Carol Green and Russell Howard. When asked about previous seizures, the Appellant said that he was not aware of any, but later changed his mind saying that he remembered one seizure but had heard nothing so assumed the matter was closed. The Appellant had however been present during two seizures, once on 29 October 2009 and again on 9 September 2011 (the first seizure). He had been assessed in respect of the 2009 seizure.

29. Officer Green in her witness statement says that during the course of the interview, the Appellant changed his mind about his role in the store, firstly saying that he worked in the store as a paid employee and then retracting this statement saying that he was in the store as a consultant. When asked to describe the arrangements for payment, the Appellant said that Mrs Raja took £80 a week out of the sales till but could not explain how this was accounted for in his business records. The Appellant said that Mrs Raja did not have a written tenancy agreement as that would have contravened a prohibition on subletting in his own lease of the premises.

30. Officer Green's record of the interview shows that when asked whether he owned the goods in the premises the Appellant said "I am not going to say". When asked where he had obtained the goods from the Appellant evaded answering.

31. On 31 August 2012 an assessment for payment of the excise duty in respect of the first seizure was issued to the Appellant in the sum of £2,033.

32. The Appellant attended for interview again on 28 September 2012, when he provided copy bank statements, an electricity bill and some hand written stock records and documents purporting to support his claim that he rented the shop to Mrs Raja. Officer Green says in her witness statement that the documentation provided by the Appellant contained no commercially valid evidence to show that the business was owned by Mrs Raja at the time of the seizures.

33. On 14 September 2012, following an email and telephone call from the Appellant on 30 July 2012 which requested that the Appellant's co-operation be taken into account in respect of the penalty in respect of the second seizure, HMRC advised the Appellant that the penalty of £988 was to be reduced to £898.

34. By letter on 4 September 2012 the Appellant requested a full review of the decision in respect of the second seizure and said that his accountant would be sending all relevant documents. No such documents were provided.

35. The penalty in respect of the first seizure was assessed on 13 September 2012 in the sum of £711.55.

36. Officer Charles Dunn conducted an independent review of the assessment and penalty. By way of letter on 31 January 2013 the Appellant was informed that the assessment of £2,568 in respect of the second seizure and penalty of £898 had been reviewed but upheld in full.

37. On 20 January 2013 the Appellant requested that the decision in respect of the first seizure be reviewed by a HMRC Officer not previously involved in the matter, stating that the shop had been rented to Mrs Sabina Raja from 31 January 2011 to 26 May 2012. In his letter the Appellant said;

5            “I have spoken to Mr Zafer Raja and Rashid Saeed (these were the people at the shop when the officers seized the goods) and I have asked them to give me a letter to confirm that they were working for Mrs Raja and that the goods seized belonged to her. I’ve also asked that they attend the tribunal as witnesses to support my story.”

10        38. On 23 January 2013 HMRC issued a penalty explanation letter which informed the Appellant that a penalty of £711.52 would be charged. The Appellant was asked to supply any relevant information which he believed had not been taken into account in calculating the amount of the penalty.

15        39. In early February 2013, Mr Mobarak forwarded a letter to HMRC purportedly from a Mr Rashid Saeed, dated 31 January 2013, (but signed on 4 February 2013) which said:

20            “I have been asked by Mr Mobarak to contact you regarding the above matter. I would like to confirm that I was working for Mrs Sabina Raja when customs seized some tobacco and cigarettes. I have informed the officers that I am working for Mrs Raja and she is renting the shop from Mr Mobarak and the stock belongs to her and I was not aware that it is illegal to sell such a product. I am willing to meet you if necessary and attend as a witness at Court...”

25        40. HMRC acknowledged the letter on 5 March 2013, but pointed out to the Appellant that the matter in respect of which an assessment and penalty had been made related to the first seizure in September 2011, when only the Appellant was present. The Appellant did not respond to this letter.

41. On 29 May 2013 a review of the decision of 31 August 2012 was undertaken and the decision upheld and the penalty assessment was issued on 26 April 2013.

The Appeal against the first decision - TC/2013/01630 (the second seizure)

30        42. By Notice of Appeal dated 28 February 2013 the Appellant appealed HMRC’s first decision. The Appellant’s grounds of appeal can be summarised as follows:

35            i.        That the Appellant was the leaseholder of 1 Grandale Street and had sub-let the shop to Mrs Raja from 31 January 2011 to 23 May 2012. The Appellant asserted that all the stock had been sold to Mrs Raja and that the stock value and rent was paid into his bank account.

ii.        That Customs Officers have seized cigarettes and tobacco from the shop and Mrs Raja's house on several occasions. During a meeting with Ms Carol Green, a Customs Officer, on 28 August 2012, the Appellant was informed

that goods were seized on 09/09/2011, 29/10/2011, 22/10/2011, 10/11/2011, and 15/01/2012.

- iii. The Appellant states that all his records were given to Ms Green at one of the interviews.
- 5 iv. The Appellant asserts that the issue is between HMRC and Ms Raja who he states was responsible for the shop at the time of the seizures. The Appellant says that he was trading from adjoining café premises at 100 Wilmslow Road and also at 13 Oxford Road, Manchester.

The Appeal against the second decision’ - TC/2013/004839 (the first seizure)

10 43. By a Notice of Appeal dated 16 July 2013 the Appellant appealed HMRC’s second decision on review of 29 May 2013.

44. The Appellant’s grounds of appeal are the same as those submitted in respect of the first decision.

**THE EVIDENCE**

15 45. The evidence before the Tribunal included witness statements from UKBA/HMRC officers involved in the seizures, copy notebook entries made by the Officers concerned, statements by Officers Stephen Glendon and Carol Green, who both act as Excise Assurance Officers for HMRC and made the excise assessment decisions, copy correspondence, assessments, penalty notices and the documentation  
20 provided by the Appellant. Officer Green and Officer Glendon both gave oral evidence to the Tribunal, as did the Appellant and his witness, Mr Mohammad Shahid.

**THE LAW**

The Assessments

25 46. Sections 5, 6 and 10 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 state:

5. Subject to regulation 7(2), there is an excise duty point at the time when the goods are released for consumption in the United Kingdom.

30 6(1) Excise goods are released for consumption in the United Kingdom at the time when the goods —

(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or referred under a duty deferment arrangement

35 10 (1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) is the person holding the excise goods at that time.

(2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

33. Section 12(1A) of the Finance Act 1994 states:

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12(1A) (1) Subject to subsection (4) below, where it appears to the Commissioners —

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(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount can be ascertained by the Commissioners, the Commissioners may assess the amount of duty due from that person notify that amount to that person or his representatives.

### The Penalties

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47. Schedule 41 Part 4 (1) of the Finance Act 2008 states:

#### *Handling goods subject to unpaid excise duty*

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4(1) A penalty is payable by a person (P) where—

(a) after the excise duty point for any goods which are chargeable with a 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.

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48. Schedule 41 part 5 (3) and (4) of the Finance Act 2008 states:

#### *Degrees of culpability*

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5(3) The doing by P of an act which enables HMRC to assess an amount of duty as due from P under a relevant excise provision is—

(a) “deliberate and concealed” if it is done deliberately and P makes arrangements to conceal it, and

(b) “deliberate but not concealed” if it is done deliberately but P does not make arrangements to conceal it.

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(4) P's acquiring possession of or being concerned in dealing with goods on which a payment of duty is outstanding and has not been deferred is—

(a) “deliberate and concealed” if it is done deliberately and P makes arrangements to conceal it, and

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(b) “deliberate but not concealed” if it is done deliberately but P does not make arrangements to conceal it.

#### *Amount of penalty*

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6B The penalty payable under any of paragraphs 2, 3(1) and 4 is—

.....

(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue.

*Reductions for disclosure*

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12-(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by—

(c) telling HMRC about it,

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(3) Disclosure of a relevant act or failure—

(d) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or about to discover the relevant act or failure, and

(e) otherwise, is “prompted”

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13 (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a “standard percentage”) has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

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(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it —

(f) for a prompted disclosure, in column 2 of the Table

**HMRC’s CASE**

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The first decision (the second seizure)

49. The seizure of the goods was not challenged by the Appellant as is required by Schedule 3 Section 5 of the Customs and Excise Management Act 1979. Therefore by due process the goods were condemned as forfeit to the Crown. As a consequence it is a matter of law that the goods were deemed to be held outside a duty suspension arrangement with UK duty on those goods being unpaid, remitted or deferred under a duty deferment arrangement.

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50. The Appellant is liable to pay the excise duty on the forfeited goods, being 5580 cigarettes and 17.7 kg (part estimated) fruit tobacco, being £2,568.

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51. Additionally, the Appellant is liable for a penalty for handling goods subject to unpaid excise duty. The calculation of the penalty is based upon the amount of excise duty involved in the offence. This was originally calculated as £988 and then reduced to £898.

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52. It is the Appellant’s case that the assessment and penalty have been issued against the wrong person and the correct person is Mrs Sabina Raja, who the Appellant states was renting the store from 31 January 2011 to 26 May 2012 and had bought all the store's stock.

53. HMRC do not accept that Mrs Raja was renting the store or that she was the owner of the store's stock. It is HMRC's case that the Appellant was the owner of the store and its stock and was therefore responsible for ensuring that the goods had duty paid on them. HMRC assert that the Appellant was the 'holder' of the goods for the purpose of s 10 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010.

54. The Appellant's name is listed on the VAT registration document for the Rusholme Convenience Store, where the goods were held. As such, HMRC consider the Appellant to be the responsible person for the store and owner of its stock. At no point did the Appellant alter the VAT documents to indicate that Mrs Sabina Raja is the responsible person for the store and its stock.

55. In the Appellant's appeal notice he refers to documentation and records provided to Officer Green in support of the assertion that Mrs Raja is the person liable for the assessment and penalty. HMRC have considered the documentation, records and notes of interview provided by Officer Green and submit that these do not show that Mrs Raja was the 'holder' of the goods for the purpose of the assessment and penalty. HMRC make the following observations in respect of those papers:

- i. The bank statements referred to by the Appellant, which allegedly show payment for rent and stock, do not show any regular payments which could be linked to rent or a payment which could be linked to payment for the stock.
- ii. During the interview with the Appellant on 28 September 2013 he said he could not produce a contract showing that the store was under the control of Mrs Raja, because having a contract would contravene his own lease agreement.
- iii. An electricity bill was provided but had no name on it.
- iv. Hand written stock notes and papers by the Appellant do not provide any proof as to who was in control of the premises and goods at the time of the seizure. In fact the hand written notes refer to a 'Café' account for the purpose of rent and refer to rent being paid against specific dates which are not reflected in the copy bank statements provided.

56. At the time of the first seizure, which took place on 9 September 2011, the Appellant was present and the seizure notice was issued and served directly on him. This took place approximately one month before the second seizure, and demonstrates that the Appellant was the owner of the store and was responsible for the goods at the time. His presence at the store on 9 September 2011 contradicts his assertion that the store was rented to Mrs Raja from 31 January 2011 to 26 May 2012.

57. HMRC submit that the assessment and penalty in respect of the first decision have been correctly issued against the Appellant. HMRC contend that for the purposes of regulation 10(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, the person holding the excise goods who is the person liable to pay the duty can include the person who is in physical possession of the goods at the time

they are seized, or the person with title or ownership of the goods. The assessment has been issued correctly to the Appellant because, on the evidence, he was the store owner with title or ownership of the goods, and he was the person who would have benefitted from the duty not being paid.

5 58. It therefore follows that the penalty has been correctly issued against the Appellant. HMRC rely on Schedule 41 part 4(1)(a) of the Finance Act 2008 which stipulates that a penalty is payable by a person who has 'acquired possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods'.

10 The second decision (the first seizure)

59. HMRC repeats their submissions in respect of the first decision as set out in paragraphs 49 and 52 to 55.

60. HMRC determine that the Appellant is liable to pay the excise duty of £2,033 on the forfeited goods being 1,400 cigarettes and 20.5 kg of fruit tobacco.

15 61. Additionally, HMRC determine that the Appellant is liable for a penalty for handling goods subject to unpaid excise duty of £711.52. The calculation of the penalty is based on the amount of excise duty involved in the offence and was reduced for 'telling, helping and giving' and because the Appellant did not conceal the goods from Officers.

20 62. The Appellant was the only person present at the store during the seizure. He told Officers that he sold the goods. This indicates he was in control of the store and not renting it out.

25 63. The answers given by the Appellant during questioning prior to the seizure indicated to HMRC that the store and all its stock belonged to the Appellant. At no time did the Appellant refer to Mrs Raja.

30 64. During the seizure which took place on 15 January 2012 at the residential premises of Mr Zafer Raja and Mrs Sabina Raja, Mr Raja told Officers of HMRC that the tobacco was for the Rusholme Convenience Store, owned by the Appellant. Further Mr Raja stated that the tobacco belonged to the Appellant and was being kept at their premises because they (Mr Raja and Mrs Raja) worked at the shop.

35 65. HMRC say that Mr and Mrs Raja's answers to questions during the seizures at Rusholme Convenience store on 20 October 2011, and at their home on 15 January 2012, support their contention that the Appellant was in charge of and the owner of the Rusholme Convenience Store and its stock in and around the time of the seizure on 9 September 2011.

66. There have been other seizures either at or relating to the store as follows:-

- i. Seizure at the store on 29 October 2009 of 1900 cigarettes and 10.75 kg of tobacco, seizure notice made out to the Appellant

- ii. Seizure at the store on 10 November 2011 of 480 cigarettes and 1.75 kg of tobacco
  - iii. Seizure at the residential premises of Mr and Mrs Raja of 6400 cigarettes and 75 kg of tobacco on 15 January 2012.
- 5 67. HMRC submit that the Appellant was, for all purposes, the owner of the store at the time of the seizures. The Appellant had overall control of the seized goods, and as such was the holder of the goods for the purposes of s 10 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and acquired possession of the goods and/or was concerned in the carrying, removing, depositing, keeping or otherwise dealing with the goods seized pursuant to schedule 41 of the Finance Act 10 2008.
68. The two other parties relevant in this case - Mr Zater Raja and Mrs Sabina Raja are not registered on HMRC's system as self-employed or as earning.
- 15 69. Given the above, unless the Appellant can prove on a balance of probabilities that Mrs Sabina Raja was renting the store and had full responsibility for the goods during the seizures - and the Commissioners say that in any event for one of the seizures the Appellant cannot avoid liability because he was present and handling the goods when they were seized - the appeals have to fail.
- 20 70. In relation to the first seizure, even if the store was being run by Mrs Raja, the Appellant is liable to pay the duty and a penalty since he was clearly in physical possession of the goods at the time when they were seized.
71. On 28 August 2012 and 28 September 2012, during the time of investigation relating to the October seizure, Officer Carol Green was investigating the seizure in September. As part of that investigation the Appellant attended for interview.
- 25 72. HMRC submit that the inconsistent accounts put forward to Officers by the Appellant during the interviews on 28 August 2012 and 28 September 2012, indicate that he was in fact running the store at the time of the seizures.
- 30 73. There is no evidence of any payment being made by Mrs Raja to the Appellant for the stock at the beginning of the alleged rental period or a payment from the Appellant to Mrs Raja for the remainder stock at the end of the alleged rental period. Nor is there any evidence of payment for stock by instalments during the alleged tenancy period.

#### **THE APPELLANT'S CASE**

- 35 74. The Appellant's grounds of appeal are as contained in his Notices of Appeal for the first and second decisions are contained in paragraph 42 above.
75. At the hearing, the Appellant's evidence included his witness statement in which he said that his business first traded as Rushholme Convenience Store from 100

Wilmslow Road which was immediately next door to 1 Grandale Street but that he used 1 Grandale Street for correspondence purposes. He included a copy 'invoice' to Mrs Raja in the sum of £18,090.87 plus VAT, which he said showed the total value of stock on 31 January 2011 when the business was transferred to her.

5 76. The Appellant said that Mr Zafer Raja helped him with the stock take and that he assisted Mrs Raja in opening a business account with HSBC. He said that she traded as 'Aneeza Convenience Store', Aneeza being the name of one of her daughters. He provided a copy of an invoice headed Aneeza Convenience Store which he says he found when cleaning the premises. No copy accounts or tax returns were produced to  
10 provide evidence of the sale of stock.

77. Also included was a 'credit note' showing the total value of stock of £17,781 plus VAT when he took the shop back from Mrs Raja on 26 May 2012. The stock take took place between 23 and 26 May 2012. Again Mr Raja helped him with the stock take together with Mr Mohammad Shahid who the Appellant said would give  
15 evidence to that effect. The Appellant did not produce a copy of his VAT return for the two relevant periods.

78. For business rates purposes the Appellant said that he notified Manchester City Council when he resumed occupation of the premises from 23 May 2012. However no copy business rates demands were produced in respect of the period January 2011 to  
20 May 2012, to show that Mrs Raja had assumed responsibility for business rates as the occupant of the shop.

79. The Appellant says that he asked Mrs Raja's brother Suhail, who was aware of the arrangement with his sister, to provide a witness statement, but Suhail refused to do so as he did not wish to be a witness against his own sister.

25 80. The Appellant produced a copy 'agreement' between himself and Mrs Raja which set out the basic terms of the arrangement. The agreement which was for 12 months and (so far as relevant to this appeal) refers to:

- i. Rent of £300 per week for the first six months and £350 per week thereafter, with Mrs Raja paying £4000 rent in advance.
- 30 ii. Mrs Raja could give one month's notice of determination at any time.
- iii. At the end of the agreement Mrs Raja have the option of purchasing the goodwill from the Appellant.
- iv. Mrs Raja was to keep a record of all purchases and sales, open her own bank account, bank takings on a weekly basis, pay any bank charges relating to  
35 credit card sales and retain any commission received from payzone sales.
- v. Pay for all business rates and utilities.
- vi. Stock to be valued at sales price less 15% profit margin except cigarettes.

There was nothing in the agreement to support the Appellant's assertion that title to the stock had passed to Mrs Raja nor any terms relating to payment for stock, either at the commencement of the tenancy or by way of instalments.

5 81. The Appellant produced a rental schedule showing the agreed rate of £300 per month from January 2011, rising to £350 per month from the beginning of August 2011 and continuing until 21 May 2012. He did not however produce any copy bank statements to evidence actual receipt of the rent. Copy bank statements were produced but the receipts appeared to correspond to a schedule of rent relating to the adjoining café premises also owned by the Appellant. He said Mrs Raja sometimes didn't pay  
10 the rent and on many occasions the monies were mixed up with credit card payments due to him from the sale of stock.

15 82. The Appellant produced some handwritten notes to support his assertion that payment had been made to Mrs Raja of the monies due under the credit note at the end of the tenancy, but again no copy bank statements were produced to evidence the payment. The Appellant was only able to produce one utility account, being an electricity bill for the period June to September 2011, but there was no name on the bill.

83. Mr Rashid Saeed who said that he would attend the hearing and give evidence to the Tribunal in support of the Appellant (see paragraph 39 above) did not attend.

20 84. Mr Mohammad Shahid said in oral evidence to the Tribunal that he had assisted the Appellant with the stock take when the Appellant rented out the shop in January 2012. He said that as far as he was aware Mrs Raja was the proprietor of Rusholme Convenience Store between January 2011 and May 2012, having visited the store several times in that period. He said that the Appellant sometimes had problems  
25 obtaining rental and payment of the goods that had been sold to her when she took on the shop. In contradiction of what the Appellant had said in evidence, Mr Shahid said that he did not help with the May 2012 stock take. Mr Shahid said that Mrs Raja was good with customers but was unable to read or write.

30 85. The Appellant produced a number of invoices and statements which related to 'Mobarak's Café' 100 Wilmslow Road and other business premises at 'Oxford Kiosk' 35 Oxford Road Manchester from which the Appellant also traded. He did so to support his contention that he was engaged in running businesses from other premises and that he was not trading from 1 Grandale Street.

35 86. When asked in what form he had received the £4,000 bond payment from Mrs Raja, the Appellant said the money had been paid in cash.

87. The Appellant said that he had suffered financial difficulties in paying VAT due to HMRC and that he had been unable to keep up with and provide copy VAT quarterly returns for the business in respect of the periods immediately before and after the sale of the stock to Mrs Raja.

40 88. In evidence the Appellant disputed that he was not Mohammad Selim, the individual in the Rusholme Convenience Store on 9 September 2011. He pointed out

that the Officers had not asked the individual for evidence of his identity as they had when he went for interview in August and September 2011. It is not clear how the Appellant could have known that the Officers had not asked for I.D, if as he alleged he was not in the store at the time. Also, the Appellant could not explain who  
5 Mohammad Selim was, or why the individual gave the Appellant's correct date of birth. He could also not explain why he had never mentioned this in correspondence with HMRC save for a brief mention of it at one of the interviews.

## CONCLUSION

89. The issues before the Tribunal are:

- 10 i. Was the Appellant 'holding' the goods seized on 9 September and/or 20 October 2011?  
ii. Did the Appellant acquire possession of the goods or was he concerned in the carrying, removing, depositing, keeping or otherwise dealing with the goods seized on 9 September and/or 20 October 2011?

15 90. It is not in dispute that the Appellant was the leaseholder 1 Grandale Street Manchester and owner of the Rusholme Convenience Store up until 31 January 2011 when the Appellant says that he rented the shop and sold the stock to Mrs Raja. The business operated from the premises was registered for VAT purposes in the  
20 Appellant's name and there is no evidence of any alteration to the status of the business whether by way of cessation or transfer at any time.

91. It is not in dispute that the goods seized were held on the premises, that they were sourced illicitly and that some were held up for sale in the retail area of the shop.

25 92. There is no viable commercial documentation evidencing a valid agreement between the Appellant and Mrs Raja. The typed 'agreement' relied on by the Appellant is not signed by either party or dated. In interview with HMRC the Appellant, in answer to the question whether he had a rental agreement with Mrs Raja, said 'not really'. There is no reliable evidence of receipt of rental payments from Mrs Raja.

30 93. The Appellant has not provided any evidence relating to the transfer of the business to Mrs Raja. There is no evidence of a transfer of fixtures fittings and equipment relating to the business, nor any evidence of a formal assignment of title to stock. In July 2012 the Appellant conceded in a telephone call and email to HMRC that he had no evidence to support his assertion that he rented out the store to Mrs  
35 Raja.

94. The invoices, electricity bill and other documents relied on by the Appellant do not contain Mrs Raja's name and could be attributed to anyone. Handwritten notes of purported payments to Mrs Raja are not consistent with the credit note.

40 95. The Appellant has produced a letter from Rashid Saeed which says that he worked for Mrs Raja in the shop. This in itself is not conclusive of Mrs Raja's role in the shop

and Mr Saeed did not attend the hearing to give evidence as he said he would. His evidence could not therefore be tested.

5 96. There may have been an arrangement between the Appellant and Mrs Raja that she took over the running of the Rusholme Convenience Store and for that purpose a stock take took place in January 2011, but in our view that was because she was an employee of the Appellant and was merely selling the stock on behalf of the Appellant. Indeed the agreement between the Appellant and Mrs Raja, even if it can be regarded as properly reflecting a formal arrangement, refers to her having the option of purchasing the goodwill of the business at the end of the tenancy.

10 97. None of the letters which purportedly came from Mrs Raja are signed which casts serious doubt on the authenticity.

15 98. The fact that the Appellant retained ownership of the stock, and effectively control of the store, is supported by his exchange of correspondence with HMRC. On various occasions the Appellant changed his account of his role in the store. The Appellant did not challenge the assessments until he received demands for payment and in his interviews with HMRC in August and September 2012 when he was evasive and refused to answer whether or not he was the owner of the stock. He attempted to mislead HMRC's Officers when he denied that he had previously been involved with other seizures.

20 99. The Appellant on a number of occasions said that either he or his accountants would provide documentation to support his assertion that his business had been transferred to Mrs Raja, but no such evidence was forthcoming.

25 100. We do not accept the Appellant's evidence that he was not the individual at the premises on the occasion of the first seizure in September 2011. Apart from indicating in his interview in August 2011 that he was not at the premises, there was no other mention in the exchange of correspondence with HMRC that the Appellant disputed he was present during the seizure.

30 101. The Appellant's statements to Officers at the first seizure, that the cigarettes were dropped off at the shop by random people, "mainly travellers" and that he had receipts for the fruit tobacco but that they were 'somewhere' are entirely implausible.

102. The evidence provided by the Appellant, both to Officers and during the appeals' proceedings, does not sufficiently prove, on the balance of probabilities, that he was not the owner of the store when the two seizures took place.

35 103. The evidence given by Mr Shahid that he was present at the stocktaking in January 2011 but not present at the stock take in May 2012 contradicts the Appellant's statement that Mr Shahid assisted with the May 2012 stocktake.

40 104. For the above reasons we find that in respect of both the first and second seizures, the Appellant owned and operated the business at Rusholme Convenience Store and the seized goods held on those premises. The Appellant had possession of the goods and was concerned in the '...carrying, removing, depositing, keeping or

otherwise dealing with the goods'. Duty had not been accounted for on those goods and the Appellant was therefore liable to pay the duty on the goods and the wrongdoing penalty for holding or handling goods subject to unpaid excise duty.

5 105. We find that the assessments were correctly made and the penalties correctly calculated.

106. We accordingly dismiss both appeals.

107. 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.

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**MICHAEL S CONNELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 24 September 2014**

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