



TC04642

Appeal number: TC/2013/4290

EXCISE DUTY – Reg 13 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 – haulage subcontracted - whether appellant liable

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LEICESTER EXPRESS LOGISTICS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY’S **Respondents**
REVENUE & CUSTOMS

**TRIBUNAL: Judge Peter Kempster
Mr Henry Russell OBE**

Sitting in public at Priory Courts, Birmingham on 18 March 2015

Mr Christopher Snell of counsel, instructed by Rainer Hughes, for the Appellant

Ms Jennifer Newstead-Taylor of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Appellant (“LELL”) appeals against an assessment to excise duty in the amount of £22,229.00 issued by the Respondents (“HMRC”) on 19 March 2013 (“the Disputed Assessment”).

Background

2. The following facts are not contentious.
3. LELL is a haulage company.
4. On 18 October 2012 at Dover docks UK Border Force officers intercepted a Renault lorry tractor unit and curtain sided trailer (“the Vehicle”) laden with around 25,000 litres of beer (“the Beer”). The driver (Mr Davies) produced a CMR consignment note and Bordereau de Livraison (“BDL”) dated 15 October 2012, which stated an Administrative Reference Code (“ARC”) generated by the EU Excise Movement & Control System. On enquiry, the officers suspected that the ARC had been used previously; they seized the Vehicle and the Beer (pursuant to s 139(1) Customs and Excise Management Act 1979).
5. No challenge to the seizure of the Vehicle and/or the Beer was made by LELL within the applicable time limit.
6. On 28 November 2012 HMRC met with Mr Rajvinder Singh (director of LELL) and Mr Singh provided certain documents.
7. On 19 March 2013 HMRC issued the Disputed Assessment (pursuant to s 12 Finance Act 1994). LELL requested a formal review, which was undertaken and HMRC upheld the Disputed Assessment by a decision issued on 23 May 2013. On 21 June 2013 LELL appealed against the Disputed Assessment.
8. We understand that HMRC have also issued a penalty to LELL in connection with these matters but that penalty was not before the Tribunal.

Law

9. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) provides (so far as relevant):
- “(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.

5 (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—

(a) by a person other than a private individual;

...”

Evidence

10 10. As well as a bundle of documents we took oral evidence from the following witnesses (both of whom also adopted and confirmed formal witness statements): for LELL, Mr Rajvinder Singh (director of LELL); and for HMRC, Mr Geoffrey Germaney (HMRC officer).

Mr Singh's evidence

15 11. Mr Singh is a director of LELL. LELL is a haulage company trading since 2004. It had previously transported textiles but that market had declined. It had owned its own lorry but sold it in 2012. Since then LELL had mainly subcontracted to a number of Slovakian hauliers.

12. At 10.36 on 16 October 2012 he received an email from Ahmad Zai SPRL (“AZ”) in Belgium:

20 “Dear Sir

We want to book one lorry from your company to pick up one load of beer from CARE DISTRIBUTION, FRANCE and deliver to PLUTUS BOND UK, IN LIVERPOOL, UK.

25 Please book this job and pick up today: 16 OCTOBER 2012, AND DELIVER TO PLUTUS 22 OCTOBER 2012.

THE BOOKING REFERENCE AT PLUTUS IS: C15551

CAN YOU PLEASE CONFIRM YOUR TRAILER NUMBER ????

Thank You

Sunil”

30 13. This was the first instruction that LELL had received from AZ. The contact at AZ – Sunil – was also involved with a business called Koko Designs for which LELL had previously transported textiles. LELL had carried out due diligence on AZ; he had checked the VAT number on the BEIS website but had not kept a copy; he did not visit their premises in Belgium.

35 14. LELL was unable to take on this instruction itself (because it did not own a lorry) and so he contacted Kelko Haulage based in Essex (“Kelko”) to subcontract the work to Kelko for an agreed price. This was the first time that LELL had instructed Kelko as subcontractors. LELL had carried out due diligence on Kelko.

15. LELL invoiced AZ and was paid. Kelko invoiced LELL and was paid.

16. Kelko used its own vehicle for transportation. Mr Singh did not know whether Kelko had made a restoration claim for the Vehicle. Border Force had written to LELL on 7 November 2012 about seizure of the Vehicle but as it did not belong to LELL he did not make any claim; he passed the documents to Kelko but did not know
5 what they had done. He did not know what AZ had done about the seized Beer. He was surprised to receive the Disputed Assessment as the Beer did not belong to LELL.

17. LELL continued to trade with Kelko. LELL stopped trading with AZ in January 2013 when AZ stated that they no longer wanted to trade in this market.

10 18. In cross-examination by Ms Newstead-Taylor:

(1) LELL had previously transported alcohol consignments for Koko Designs. Mr Singh had first met the individuals involved in Koko Designs on a ferry – they were Joe and Alan but he did not know their surnames. He had also
15 met Koko Design’s people in Brussels when he performed some of the textile deliveries. Koko Designs had asked if LELL could provide transport for AZ. He regarded the AZ transportation as a straightforward job.

(2) Koko Designs had paid in cash in Sterling by courier because they were doing business in the UK buying clothes. He counted the cash and banked it straight away. LELL used to be paid in cash a lot and he was happy to be paid.

20 (3) He had no knowledge of and could not comment on what the driver of the Vehicle had told the UK Border Force when the Vehicle was stopped.

(4) Mr Singh accepted that:

(a) There were discrepancies on the copies of the emails from AZ which he had provided to Mr Germaney and those provided to the
25 Tribunal as part of the trial bundle – including the Plutus booking references being different numbers. He must have attached the wrong one to his witness statement; it must relate to a different order.

(b) He had not provided to Mr Germaney a copy of the complete email chain with AZ although that had been available. He had provided what
30 had been requested. He denied that the emails were not genuine.

(c) In correspondence he had said “we will do job”, “we will collect” and “our trailer number” but that was because the customer was dealing with LELL. As long as the job was done properly the customer did not worry about whose truck it was.

35 (d) LELL did not hold insurance covering the goods in transit. He believed that Kelko had a legal obligation to carry appropriate goods-in-transit insurance. He did not know if AZ would claim against LELL if the Beer had been damaged. He would look to claim against Kelko.

40 (e) He should have put Kelko’s name in the box marked “successive carriers” on the CMR.

(f) The pickup details on emails to Kelko were incorrect. He had corrected this during a phone call from Kelly at Kelko. Much of the arrangements were settled over the phone (such as the details of the trailer

numbers), with the emails being later confirmations. No one had asked him before about the phone calls.

5 (g) He may have told Mr Germaney that this had been the third load for AZ that week – it was a long time ago and LELL had then only just started doing business with AZ. He believed he had provided a copy of the correct invoice.

Mr Germaney's evidence

19. Mr Germaney is the HMRC officer who met with Mr Singh on 28 November 2012.

10 20. At the meeting Mr Germaney explained the reason for the seizure of the Consignment – that there was enough information to suggest a diversion of duty suspended alcohol – and gave an explanation about frauds involving excise goods moving under duty suspension from the EU into the UK.

15 21. Mr Singh had explained that LELL had transported the Beer for Koko Designs of Rue Broginez, Belgium, and that this was the first time LELL had undertaken work transporting alcohol for Koko Designs. The main business activity of LELL had previously been the transportation of textiles around Europe, using Slovakian hauliers. LELL did not own any vehicles, having sold its lorry (an 18 tonne vehicle) two months previously. LELL stopped moving textiles about a month prior to the seizure
20 of the Beer and instead had started to move alcohol for the same customer as the textile jobs: Koko Designs. The paperwork relating to the Beer showed AZ in Belgium as LELL's customer, and Mr Singh confirmed he dealt with the same person, Sunil Madani, for both businesses. He said that he did not use the Slovakian hauliers for alcohol transports but instead subcontracted to Kelko and Coyle Transport
25 (Ireland); they were the cheapest of the companies he had contacted. Mr Singh said that the Vehicle was owned by Kelko, and that he did not know the driver of the Vehicle. He said that he received some payments for the work for Koko Designs by bank transfer but recently had been paid in cash (which could be thousands of pounds at a time) from Mr Madani, by courier (said to be Mr Madani's cousin), in respect of
30 which he issued no receipt and kept no full record.

22. During the meeting Mr Singh presented to Mr Germaney the following documents relating to the Beer:

35 (1) A note from Sunil requesting collection of a load of beer from Care Distribution in France on the date of the note, 15 October 2012, for delivery to Plutus Bond in Liverpool on 19 October 2012.

(2) An undated note signed "Raj" and addressed to "Kelly", which Mr Singh said he had sent to Kelko after receiving their confirmation that they would undertake the work, to confirm the consignment to be collected. The note gave the trailer number KK1, a reference, the list of goods and the destination.

40 (3) An invoice from LELL to Sunil for £58,000 for transport charges, in respect of which Mr Singh could not say whether it related to the transportation of the Beer, or not.

(4) A letter from Kelko dated 10 November 2011, which Mr Singh said should have been dated 2012, relating to Kelko's charges, the amounts of which were unspecified.

23. On 30 November 2012, HMRC received further documents which had been requested at the earlier meeting. These included invoices from LELL to AZ for transport charges from 22 October 2012 to 26 November 2012, invoices from Kelko to LELL for transport charges from 23 October 2012 and 24 October 2012. The documents also included bank statements for LELL, an e-mail chain showing transport arrangements between Sunil Madani of AZ and Mr Singh of LELL dated 15 October 2012, and an e-mail chain showing transport arrangements between LELL and Kelly Philpot of Kelko.

Appellant's case

24. Mr Snell for LELL submitted as follows.

25. LELL was not liable under reg 13 because LELL was not the person making a delivery of the goods, and did not have possession of the goods, having subcontracted the transportation of the Beer to a third party. As was clear from the evidence, LELL did not have a lorry and so could not deliver the goods. From the review letter, it was clear that HMRC understood and accepted that LELL was not making the delivery but instead making arrangements for delivery of the goods by contracting with a third party, Kelko. The haulier, and therefore the person making the delivery of the goods, was Kelko. Mr Singh's record keeping may have been poor but there was clear evidence (being the emails, invoices and bank statements) that LELL had a business relationship with Kelko and had paid Kelko for Kelko's services. LELL denied any involvement in any irregular movement of excise goods.

25 *LELL was not within reg 13(2)(a)*

26. HMRC had misinterpreted reg 13(2)(a). Their view in the review letter was, "[LELL] is considered liable as they were responsible for making arrangements for delivery of the goods." That was not in accordance with reg 13(2)(a): "the person liable to pay the duty is the person ... making the delivery of the goods". The difference was subtle but significant. Regulation 13(2)(a) did *not* include a person who makes arrangements for delivery of the goods.

27. Regulation 13 implemented the provisions of art 33(3) Council Directive 2008/118/EC which was in near-identical terms (emphasis added):

35 "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."

28. The act of "making" the delivery necessarily involves some sort of physical action; it necessarily involves the transportation of the Beer, as opposed to merely the making of arrangements for the transportation. Had reg 13 and art 33(3) (which was itself intended to be clarificatory of earlier provisions – see recital 1 of the Directive) have been intended to have caught those who act, in essence, as transportation brokers, the same would have been clear upon the face of the provisions.

29. Further, the wording of reg 13(2)(a) can be specifically contrasted with that of other closely related legislation. For example, the (now repealed) Tobacco Products Regulations 2001 provided at (confusingly) reg 13 that:

5 “(1) The person liable to pay the duty is the person holding the tobacco products at the excise duty point.

(2) Any person (not being the person specified in paragraph (1) above) who is described in paragraph (3) below is jointly and severally liable to pay the duty with the person specified in paragraph (1) above.

10 (3) Paragraph (2) above applies to ... (e) any person who caused the tobacco products to reach an excise duty point.”

30. Use of the phrase “any person who caused the tobacco products to reach an excise duty point” would clearly be wide enough to catch LELL, had the relevant regulations utilised such phraseology. However, no such phrase is utilised in the 2010 Regulations. Instead, the straightforward formulation of “the person making delivery” has been chosen by Parliament. It must, therefore, be given its plain and ordinary meaning, under the presumption that the words used in an Act of Parliament are used “correctly and exactly” (*Spillers Ltd v Cardiff Assessment Committee* (1931) 2 KB 21, per Lord Hewart CJ).

20 31. This approach was supported by the Court of Appeal decision in *R v White and other appeals* [2010] STC 1965, which had considered that court’s earlier decision in *Revenue and Customs Prosecutions Office v Mitchell* [2009] EWCA Crim 214, [2009] 2 Cr App Rep (S) 463. In the circumstances of the current appeal, the person responsible for causing the Beer to reach the excise point was Kelko, and the person retaining control over the Beer was also Kelko.

HMRC should not have assessed LELL

32. Regulation 13 provides for a number of alternatives in respect of the legal person(s) against whom an excise assessment can be raised when the situation in reg 13(1) arises. Note should be taken of the wording utilised by reg 13(2): “Depending on the cases referred to in paragraph (1) ...”. It was clear that the persons identified as having a potential liability by reason of reg 13(2) are not to be held liable in all circumstances. Instead, the choice of legal person is dependant upon the circumstances (“cases”) referred to in reg 13(1).

33. Some assistance could be gained from the precursor to the 2008 Directive: Council Directive 92/12/EEC (“the 1992 Directive”). Article 7 of the 1992 Directive dealt specifically with the case where products subject to excise duty, and already released for consumption in one Member State, were then held for a commercial purpose in another Member State:

40 “7(3) ...Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.”

34. It is, therefore, clear that the choice of person whom is to be held liable for the excise duty is dependant on all of the circumstances of the case. HMRC had apparently given no consideration as to whether or not LELL is the most appropriate person against whom to raise an excise duty assessment in all of the circumstances of the case.

35. The matter was not covered in the review decision. It was important that:

(1) LELL would derive no financial benefit from an irregular movement of the Beer as between EU Member States. The real benefactor of the irregular movement would be the consignee Plutus (UK) Limited.

(2) LELL had no knowledge as to whether or not the ARC had been utilised on a previous occasion. The documentation provided appears to be mostly in order.

(3) Although there had been deemed forfeiture of the Beer (and the Vehicle), the seizure appears to have taken place on the suspicion that the ARC had been utilised on pervious occasions. It had not been established as a matter of fact (without prejudice to the deeming provisions) that the ARC had been used on multiple occasions.

(4) None of the evidence presented by HMRC tends to suggest that LELL was complicit, in any way, in the irregular movement.

36. Taking into account of all the circumstances of the case, the person against whom any excise duty assessment should have been raised was the consignee (the details of whom HMRC had and/or could be gleaned from the CMR). Utilisation of reg 13(2)(a) should be properly reserved for a situation whereby the transporter is complicit in the irregular transportation, and stands to benefit therefrom.

Respondents' case

37. Ms Newstead-Taylor for HMRC submitted as follows.

38. The documentation surrounding the import of the Beer was incomplete, contradictory and unsatisfactory. HMRC accepted there was some business relationship between LELL and Kelko but the Appellant had not discharged the burden of proof to establish the true situation concerning the claimed subcontracting of the transport of the Beer to Kelko. The relationship between LELL and Kelko appeared tenuous. Even taking the emails at face value, everything seemed to have been decided within 40 minutes, with no checks or other quotes being obtained. LELL seemed to have quoted a price to AZ before knowing what Kelko would charge. The driver when questioned by Border Force in Dover gave contradictory answers about who he worked for. No evidence from Kelko had been adduced.

39. Similarly, the documentation relating to AZ was not merely confusing but suspicious; documents had been provided which contained identical text except for different dates. Even at face value, AZ clearly thought they were booking a lorry from LELL, and had no knowledge that LELL was going to subcontract the job. The serious implications for insurance, transport regulations and other matters had apparently been completely ignored.

40. The person liable to pay the duty under reg 13 is the person making the delivery of the goods, holding the goods intended for delivery or to whom the goods are delivered. HMRC contended that even if LELL (the party named on the CMR consignment note, the Bordereau de Livraison and the EMCS as the carrier of the goods) had (as it argued) sub-contracted the obligation to deliver the goods, when the Vehicle was stopped LELL was still making a delivery of the goods. LELL had admitted that it subcontracted the obligation to deliver the goods; it therefore argued that it was itself under an obligation to deliver the goods, and fulfilled that obligation by making contractual arrangements with another party, Kelko. A person who accepts a contractual liability to deliver goods and makes arrangements for the delivery has control over the goods, and delivers them for the purposes of reg 13. It is not necessary for a company's employee or officer to drive the lorry which delivers goods in order to fall within the meaning of "making delivery" for the purposes of reg 13. A company which makes contractual arrangements with another person for the delivery of goods is equally "making delivery" for the purposes of reg 13.

41. It was clear from the CMR and the BDL that LELL was the transporter; anyone considering that documentation would reach that conclusion. If AZ or Kelko had any problem on the transport then they would contact LELL. If the goods were damaged in transit then AZ would claim from LELL.

42. It was incorrect for the Appellant to contend that merely by subcontracting it could escape reg 13(2). Mr Snell's analogy with the repealed Tobacco Regulations was flawed. The Tobacco Regulations had included additional words to bring into the charge to duty any person "causing" the goods to be imported, and the Criminal Division of the Court of Appeal had been required (in the context of litigation concerning criminal confiscation orders) to determine the compatibility of those words with the 1992 Directive. The 1992 Directive had been replaced by art 33 and reg 13 was in near identical wording to art 33; thus no question of incompatibility could now arise. However, in *White* the question had been answered (at [96]) that a person "causing" importation was within the head of liability of "making delivery"

43. Also incorrect was the suggestion that HMRC should somehow consider all possible persons liable for the excise duty. That had been expressly dismissed by Hooper LJ in *White* (at [82]):

"In our view and notwithstanding the reference to 'depending on all the circumstances' and the absence of any reference to joint and several liability, the 1992 Directive clearly envisages that any person who fits within the listed categories is liable to pay the excise duty. Given that one of the aims of the directive is the collection of excise duty, it is unlikely that it was envisaged that a member state, in the words of the appellant, 'must ... make a determination that a particular person is liable in the circumstances of the case', even though, for example, the excise duty could not in fact be collected from him and even though another person or other persons would be liable. That is not to say that the directive would permit recovery of more than the excise duty due—but we do not need to decide that issue in these appeals."

Consideration and Conclusions

44. HMRC's reasons for issuing the Disputed Assessment were stated succinctly in the 23 May 2013 review letter:

5 “[LELL] is considered liable as they were responsible for making
arrangements for delivery of the goods. They subcontracted the work
to Kelco or Kelco Transport Ltd. [UK Border Force] arranged for an
HMRC visit to be made to you to establish the legitimacy of the facts.
You were unable to provide the officer with satisfactory evidence of
the legitimacy of the transaction. The goods were indisputably on the
10 back of a lorry that [LELL] had contracted to do the work. In the light
of that [LELL] are considered liable to pay the duty as they were
responsible for making delivery of the goods. As a duty point has been
created under Section 13(1) above, it follows that the duty is now due
to be paid.”

15 45. At the November 2012 meeting between Mr Germaney and Mr Singh and in
subsequent correspondence, HMRC (in conjunction with UK Border Force) were
examining the facts surrounding the seizure of the Beer and the Vehicle – in
particular, the possible commission of a fraud involving excise goods moving under
duty suspension into the UK from elsewhere in the EU. There were clearly several
20 aspects of Mr Singh's business dealings that HMRC were completely justified in
regarding as suspicious:

- (1) Payments to LELL from an overseas customer of several thousand pounds in cash, when no good reason could be given as to why a bank transfer was not used.
- 25 (2) No receipts being provided by (or requested from) LELL for these substantial cash handovers, apparently performed by a “courier”.
- (3) Mr Singh's inability to tie together payments with particular jobs.
- (4) Mr Singh's relaxed attitude towards contracts involving the cross-border transport of large quantities of alcohol, which is a strictly regulated trade.
- 30 (5) Apparent discrepancies in the correspondence provided by LELL to HMRC to explain the relevant transactions – as explored by Ms Newstead-Taylor in her cross-examination of Mr Singh.

46. HMRC have not made an explicit allegation of fraud in these proceedings. In the absence of such an allegation we do not propose to make any findings on the *bona fides* of LELL's business dealings. That is, we consider, in accordance with recent pronouncements by the Upper Tribunal in *HMRC v Infinity Distribution Limited* [2015] UKUT 0219 (TCC) (at [8]), and *Ingenious Games v HMRC* [2015] UKUT 0105 (TCC) (at [76]). The only findings we propose to make in relation to the dealings between LELL and AZ are that LELL did not own the Beer, and that LELL
40 contracted with AZ to arrange the haulage of the Beer from France into the UK.

Findings of Fact

47. Having carefully considered all the evidence and on the balance of probabilities we make the following findings of fact:

- (1) LELL did not own the Beer.

(2) LELL contracted with AZ to arrange the haulage of the Beer from Coulogne (near Calais) to Liverpool.

(3) LELL did not own the Vehicle.

(4) LELL contracted with Kelko for Kelko to haul the Beer from Coulogne to Liverpool.

(5) The CMR is dated 15 October 2012 and records:

(a) The goods are the Beer.

(b) The sender of the Beer is "SARL Care Distribution c/o Ahmad Zai SPRL", with an address in Coulogne.

(c) The consignee of the Beer is Plutus UK Ltd of Liverpool.

(d) The "Transporteur/Carrier" is LELL.

(e) The Beer was taken over (ie picked up) on 15 October 2012 from the given address of the sender in Coulogne.

(f) The box on the CMR headed "Successive carriers" is blank.

(g) The box on the CMR headed "Documents attached" states an ARC - ie a unique Administrative Reference Code generated by the Excise Movement and Control System (an EU-wide computer system used to record duty suspended movements of excise goods taking place within the EU) and which is required to travel with the goods.

(6) The BDL is dated 15 October 2012 and records:

(a) The "Articles" are the Beer.

(b) The "Expediter" of the Beer is SARL Care Distribution, with an address in Coulogne.

(c) The "Destinataire" of the Beer is Plutus UK Ltd of Liverpool.

(d) There is a reference to "AC Ahmad Zai SPRL".

(e) The box on the BDL headed "Instructions livraison" states "Transporteur: [LELL]".

(f) The ARC is the same as on the CMR.

(7) The Beer was in the Vehicle when both were seized by UK Border Force.

30 *The Seizure*

48. The reasons for the seizure were stated in a letter from UK Border Force to LELL dated 7 November 2012:

"Border Force has identified that [the Vehicle] travelled to the UK at 01.20 on 17/10/12 manifested as alcoholic drinks and 04.35 on 18/10/12 manifested as foodstuffs. These earlier movements are within the lifetime of the ARC/e-AD [ie electronic accompanying document]. We believe, therefore, that the unique ARC number presented to Border Force officers had been used previously prior to interception of this load. An ARC/e-AD is unique and therefore only valid for one movement of excise goods. The seized load has therefore not moved under cover of an e-AD."

49. We were informed that the seizure has not been challenged pursuant to sch 3 Customs and Excise Management Act 1979. In those circumstances the Beer has been duly condemned as forfeited (pursuant to para 5 sch 3) and this Tribunal has no jurisdiction to consider the legality of the seizure of the Beer; the Beer is statutorily conclusively deemed to have been imported illegally: *Revenue and Customs Commissioners v Jones and Jones* [2011] EWCA Civ 824 (per Mummery LJ at [73]). We understand that matter is now not in issue between the parties but, as it was mooted in some of the documents before us, for good order we formally make a finding on that point as above.

10 *Regulation 13*

50. Regulation 13(1) provides: “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.” We find that the excise duty point in respect of the Beer arose when the Vehicle carrying the Beer arrived into the UK at Dover on 18 October 2012.

51. Regulation 13(2) provides:

“... 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.”

52. We do not accept Mr Snell’s second argument, that if in a particular case there is more than one person covered by reg 13(2) then HMRC have an obligation to determine which one of those persons it would be fairest to assess for the excise duty. On the contrary we consider the intention of reg 13 (2) – and art 33(3) from which it is derived – is to establish a liability on all those persons for the excise duty, and it is open to HMRC to assess any liable person. We consider that view is supported not only by the *obiter* comments of Hooper LJ in *White* (at [82] – quoted at [43] above) but also by the CJEU decision in *Stanislav Gross v Hauptzollamt Braunschweig* (Case C165/13). *Stanislav Gross* concerned smuggled cigarettes and whether only the first importer or a subsequent holder of the cigarettes could be assessed for the excise duty. The CJEU (including a specific reference to art 33(3)) decided:

“24 Under paragraphs 1 and 3 of Article 7 [of Directive 92/12], read in conjunction, excise duty is due in the Member State in which the products are held, inter alia, from the person receiving the products at issue or from the relevant trader.

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

5 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.

10 27 That conclusion is also supported by Article 33(3) of Council Directive 2008/118 of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12 (OJ 2009 L 9, p.12), which simplifies the provision made under Article 7 of Directive 92/12 by referring solely to the person 'to whom the goods are delivered in the other Member State' (*Metro Cash & Carry Danmark*, C-315/12, paragraph 36)."

15 53. Turning to Mr Snell's first argument, the question for us, we consider, is whether LELL was the person making the delivery of the Beer, within the meaning of reg 13(2)(a).

20 54. In *White* there was some consideration of whether the driver of a lorry could himself be liable for excise duty on his load – because that would be relevant to whether he had by evasion obtained a pecuniary advantage for criminal law purposes – and, if so, whether that was compatible with the 1992 Directive, but the Court of Appeal reached no conclusion on that point:

25 "[26] At the conclusion of the hearing we asked for written submissions about a driver's liability for excise duty, where a driver is no more than a courier paid to transport the load. ... We made that request because if drivers in this category are personally liable under the regulations to pay duty and thus would obtain a pecuniary advantage, there is an apparent conflict between the two passages in *R v May* [2009] STC 852 at [48], [2008] 1 AC 1028 at [48]:

30 '[48] [a defendant] ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale,
35 are unlikely to be found to have obtained that property. ...'

At the conclusion of this judgment we return to this issue but only briefly and without reaching any concluded opinion.

...

The lorry driver

40 [188] As we said in [26], at the conclusion of the hearing we asked for written submissions about a driver's liability for excise duty, where a driver is no more than a courier paid to transport the load into this country. We have received those submissions.

45 [189] We have decided that we shall not resolve the issue given that it is both complex and does not arise in this case. We say only this; it tentatively seems to us that a lorry driver who knowingly transports smuggled tobacco will, for the purposes of the regulations, have caused the tobacco to reach an excise duty point and will have the necessary

connection with the goods at the excise duty point. We are concerned as to whether the driver falls within art 7(3) [of the 1992 Directive], assuming that it is necessary for him to do so.

5 [190] If he does so, it would remain a matter of domestic law whether he has obtained a benefit for the purposes of confiscation proceedings. We note, in this respect, that in para [48] of *May* it was said that a defendant 'ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject' (emphasis added) and that: 'Mere couriers or custodians or other very
10 minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property.' (See *R v May* [2009] STC 852 at [48], [2008] 1 AC 1028 at [48].)"

15 55. However, *White* was looking at the now repealed provisions of the Tobacco Regulations and the now replaced 1992 Directive. Turning to the current provisions in art 33 and reg 13, those are near identical and so there is no question of any incompatibility. Further, although the Court of Appeal in both *May* and *White* was
20 apparently concerned whether duty liability could attach to "Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale", it "tentatively" reached the conclusion that "a lorry driver who knowingly transports smuggled tobacco will, for the purposes of the regulations [ie the Tobacco Regulations], have caused the tobacco to reach an excise duty point and will have the necessary connection with the
25 goods at the excise duty point". That extreme case is not applicable to the circumstances of the current appeal; HMRC have assessed not the driver of the Vehicle (Mr Davies) but instead LELL, and we heard no evidence concerning Mr Davies' role or knowledge.

30 56. Looking at the specific provision in reg 13(2)(a), we have concluded that the words "the person making the delivery of the goods" do include a person who contracts with the owner of the goods to deliver those goods. That was the position of LELL in relation to AZ (the owner and exporter of the Beer). Both the BDL and the CMR were explicit that the "Transporteur/Carrier" was LELL. Further, that where such a person subcontracts the delivery of the goods, that does not absolve the person
35 of liability for the excise duty under reg 13(2)(a) – they are still "making the delivery" albeit by an agent. That was the position of LELL in relation to Kelko (the subcontracted agent).

57. Accordingly, we find that LELL does fall within reg 13(2)(a), and thus is liable for the excise duty on the Beer.

40 **Decision**

58. The appeal is DISMISSED.

45 59. 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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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 1 OCTOBER 2015