Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 June 2021*

(Reference for a preliminary ruling – General arrangements for excise duty – Directive 2008/118/EC – Article 33(3) – Goods 'released for consumption' in one Member State and held for commercial purposes in another Member State – Person liable to pay the excise duty that has become chargeable in respect of those goods – Person holding the goods intended for delivery in another Member State – Transporter of the goods)

In Case C-279/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 19 March 2019, received at the Court on 3 April 2019, in the proceedings

The Commissioners for Her Majesty's Revenue and Customs

v

WR,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– WR, by S. Panesar, Solicitor, and D. Bedenham, Barrister,

– the United Kingdom Government, by S. Brandon, acting as Agent, and by J. Simor QC and E. Mitrophanous, Barrister,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. Collabolletta, avvocato dello Stato,

– the Netherlands Government, by M.K. Bulterman, J. Langer and J. Hoogveld, acting as Agents,

* Language of the case: English.

– the European Commission, initially by R. Lyal and C. Perrin, and subsequently by C. Perrin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 33(3) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

2 The request has been made in proceedings between The Commissioners for Her Majesty's Revenue and Customs, United Kingdom, ('HMRC') and WR concerning the legality of an assessment addressed to WR relating to the excise duty which became chargeable in respect of the goods which WR had transported to the United Kingdom without those goods being covered by a valid administrative document proving that that movement took place under a duty suspension arrangement.

Legal context

EU law

3 Recitals 2 and 8 of Directive 2008/118 state:

'(2) Conditions for charging excise duty on the goods covered by [Council] Directive 92/12/EEC [of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1)], hereinafter "excise goods", need to remain harmonised in order to ensure the proper functioning of the internal market.

…

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

4 Article 1(1)(b) of that directive is worded as follows:

'This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods …:

…

(b) alcohol and alcoholic beverages covered by [Council] Directives 92/83/EEC [of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21)] and 92/84/EEC [of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29)]'.

5 Article 4 of that directive provides:

'For the purpose of this Directive as well as its implementing provisions, the following definitions shall apply:

…

7. "duty suspension arrangement" means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;

…

11. "tax warehouse" means a place where excise goods are produced, processed, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located.'

6 Chapter II of that directive, entitled 'Chargeability, reimbursement, exemption', contains a Section 1, entitled 'Time and place of chargeability', in which Article 7 of the directive provides:

'1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, "release for consumption" shall mean any of the following:

(a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

(b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of [EU] law and national legislation;

…'

7 Article 8 of Directive 2008/118 is worded as follows:

'1. The person liable to pay the excise duty that has become chargeable shall be:

(a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):

…

(ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;

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

…

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

8 Chapter IV of that directive, entitled 'Movement of excise goods under suspension of excise duty', contains a Section 1, entitled 'General provisions', in which Article 17(1) of the directive provides:

'Excise goods may be moved under a duty suspension arrangement within the territory of the [European Union], including where the goods are moved via a third country or a third territory:

(a) from a tax warehouse to:
    (i) another tax warehouse;

…'

9 That chapter includes a Section 2, entitled 'Procedure to be followed on a movement of excise goods under suspension of excise duty', in which Article 21 of the directive provides:

'1. A movement of excise goods shall be considered to take place under a duty suspension arrangement only if it takes place under cover of an electronic administrative document processed in accordance with paragraphs 2 and 3.

2. For the purposes of paragraph 1 of this Article, the consignor shall submit a draft electronic administrative document to the competent authorities of the Member State of dispatch using the computerised system referred to in Article 1 of Decision No 1152/2003/EC [of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products (OJ 2003 L 162, p. 5)] …

3. The competent authorities of the Member State of dispatch shall carry out an electronic verification of the data in the draft electronic administrative document.

Where these data are not valid, the consignor shall be informed thereof without delay.

Where these data are valid, the competent authorities of the Member State of dispatch shall assign to the document a unique administrative reference code and shall communicate it to the consignor.

…'

10 Under the heading 'Movement and taxation of excise goods after release for consumption', Chapter V of Directive 2008/118 contains a Section 2, entitled 'Holding in another Member State', in which Article 33 of the directive provides:

'1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

For the purposes of this Article, "holding for commercial purposes" shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

…

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the [European Union] for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.

…'

The law of the United Kingdom

11 Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the 2010 Regulations') provides in paragraphs 1 and 2 as follows:

'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.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 6 September 2013, a heavy goods vehicle ('HGV') driven by WR, a self-employed worker, was stopped on arrival at Dover Docks (United Kingdom) by UK Border Agency ('UKBA') officers. The HGV contained goods subject to excise duty, namely 26 pallets of beer ('the goods at issue').

13 WR produced to the UKBA officers a 'Cargo Movement Requirement' consignment note, drawn up on the basis of the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol of 5 July 1978 ('the CMR note'). It was stated in the CMR note that the goods at issue were covered by an electronic administrative document containing an administrative reference code ('the ARC'), referred to in Article 21 of Directive 2008/118. That note also stated that the consignor was a tax warehouse in Germany and that the consignee was Seabrook Warehousing Ltd., a tax warehouse in the United Kingdom.

14 However, after consulting the Excise Movement and Control System ('the EMCS'), the UKBA officers were able to establish that the ARC stated on the CMR note had already been used for a separate delivery of beer for the same tax warehouse in the United Kingdom. Those officers therefore took the view that the goods at issue were not being moved under a duty suspension arrangement and, consequently, that the excise duty relating to those goods had become chargeable when those goods arrived in the United Kingdom. In those circumstances, the UKBA officers seized the goods at issue and the HGV carrying them.

15 Subsequently, HMRC, first, issued to WR an assessment to excise duty in the amount of GBP 22 779 (approximately EUR 26 400), pursuant to Regulation 13(1) and (2) of the 2010 Regulations ('the contested assessment to excise duty') and, second, imposed on WR a fine of GBP 4 897.48 (approximately EUR 5 700) pursuant to the provisions of Schedule 41 to the Finance Act 2008.

16 The First-tier Tribunal (Tax Chamber) (United Kingdom) upheld WR's appeal against the contested assessment to excise duty and the fine. That tribunal held that, even though he knew that the goods at issue were subject to excise duty, WR was not a conspirator in relation to the attempt to smuggle those goods. Since he did not have access to the EMCS, he had no means of verifying whether the ARC stated on the CMR note had already been used. Moreover, nothing in the documents available to him was such as to give rise to doubts in that regard. Furthermore, WR was not the owner of the HGV and had no right to or personal interest in the goods at issue, his sole aim being to collect and deliver those goods, for a fee, in accordance with the instructions received. Only the persons who had organised the smuggling attempt had the de facto and legal right of control over the goods at issue at the time when they were seized. That tribunal also found that WR had informed the person who had instructed him to transport the goods at issue that they had been seized, that the identity of those behind the smuggling attempt had not been ascertained and that HMRC had not attempted to determine the identity of those persons or that of the owner of the HGV.

17 In those circumstances, that tribunal, in accordance with the case-law of the Court of Appeal (England & Wales) (United Kingdom), held that WR was an 'innocent agent' and that, consequently, he could not be regarded as having 'held' or 'delivered' the goods at issue within the meaning of Regulation 13 of the 2010 Regulations. According to that tribunal, in the absence of actual or constructive knowledge on WR's part that he was in physical possession of smuggled goods, the imposition of liability on WR would raise serious questions of compatibility with the objectives of the applicable legislation. Accordingly, the First-tier Tribunal (Tax Chamber) annulled both the contested assessment to excise duty and the fine imposed on WR.

18 The Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) dismissed the appeal brought by HMRC against that annulment decision. That tribunal held, in essence, that the status of 'innocent agent' has the effect of exempting from all liability persons who do not have actual or constructive knowledge that the goods which they are transporting are goods in respect of which excise duty should have, but has not, been paid. It would thus be contrary both to Directive 2008/118 and to national legislation to make 'the entirely innocent agent' liable for payment of the unpaid excise duty.

19 The referring court dismissed the appeal brought by HMRC against the judgment of the Upper Tribunal (Tax and Chancery Chamber) as regards the fine imposed on WR, but has doubts as to whether, in the light of Directive 2008/118, that tribunal was correct in upholding the annulment of the contested assessment to excise duty.

20 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

2. Is the answer to Question 1 different if [the person in question] … did not know that the goods he was in possession of were excise goods?'

Consideration of the questions referred

21 By its questions, which it is appropriate to answer together, the referring court asks, in essence, whether Article 33(3) of Directive 2008/118 must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

22 Under Article 33(1) of Directive 2008/118, where excise goods which have already been released for consumption in one Member State are held for commercial purposes – that is to say, by a person other than a private individual or by a private individual for reasons other than his own use and transported by him – in another Member State in order to be delivered or used there, excise duty is to become chargeable in that other Member State. Under Article 33(3), 'the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State', is to be liable to pay the excise duty.

23 Directive 2008/118 does not define the concept of a person who 'holds' the goods subject to excise duty, within the meaning of Article 33(3) of that directive, nor does it make any reference to the law of the Member States for the purpose of defining that concept. In accordance with settled case-law, it follows from the requirements of the uniform application of EU law and of the principle of equal treatment that the terms of a provision of EU law which does not contain any express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must be determined according to the usual meaning of those terms in everyday language, taking into account the context in which they are used and the objectives pursued by the legislation of which they form part (see, to that effect, judgments of 9 July 2020, *Santen*, C-673/18, EU:C:2020:531, paragraph 41, and of 16 July 2020, *AFMB*, C-610/18, EU:C:2020:565, paragraph 50 and the case-law cited).

24 The concept of a person who 'holds' goods refers, in everyday language, to a person who is in physical possession of those goods. In that regard, the question whether the person concerned has a right to or any interest in the goods which that person holds is irrelevant.

25 Moreover, there is nothing in the wording of Article 33(3) of Directive 2008/118 to indicate that the status of person liable to pay the excise duty, as being 'the person holding the goods intended for delivery', depends on ascertaining whether that person is aware or should reasonably have been aware that the excise duty is chargeable under that provision.

26 That literal interpretation is borne out by the general scheme of Directive 2008/118.

27 Thus, under Article 7(1) and 7(2)(b) of that directive, excise duty is to become chargeable at the time, and in the Member State, of 'release for consumption'. The concept of 'release for consumption' is defined as the holding of excise goods outside a duty suspension arrangement, without excise duty having been levied. In such a case, the person liable to pay the excise duty is, in accordance with Article 8(1)(b) of that directive, 'the person holding [those] … goods and any other person involved in the holding of the excise goods'.

28 However, like Article 33(3) of Directive 2008/118, Article 8(1)(b) of that directive does not contain any express definition of the concept of 'holding' and does not require the person concerned to be the holder of a right or to have any interest in relation to the goods which that person holds, or that that person be aware or that he should reasonably have been aware that the excise duty is chargeable under that provision.

29 By contrast, in a situation different from that referred to in Article 33(3) of Directive 2008/118, that is to say, in the case of an irregularity during a movement of excise goods under a duty suspension arrangement, within the meaning of Article 4(7) of that directive, Article 8(1)(a)(ii) of that directive provides for liability to pay the excise duty on the part of any person who participated in the irregular departure of those goods from the duty suspension arrangement and who, furthermore, 'was aware or who should reasonably have been aware of the irregular nature of the departure'. The EU legislature did not restate this second condition, which can be regarded as requiring an element of intention, either in Article 33(3) or, moreover, in Article 8(1)(b) of that directive (see, by analogy, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 39).

30 It follows that, where, in Directive 2008/118, the EU legislature intended that an intentional element be taken into account for the purpose of determining the person liable to pay the excise duty, it has laid down an express provision to that effect in that directive.

31 Furthermore, an interpretation limiting the status of person liable to pay the excise duty as being 'the person … holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, to those persons who are aware or should reasonably have been aware that excise duty has become chargeable would not be consistent with the objectives pursued by Directive 2008/118, which include the prevention of possible tax evasion, avoidance and abuse (see, to that effect, judgment of 29 June 2017, *Commission* v *Portugal*, C-126/15, EU:C:2017:504, paragraph 59).

32 That directive lays down, as stated in Article 1(1) thereof, general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the goods listed in that article, in particular so that, as is apparent from recitals 2 and 8 thereof, chargeability of excise duty is identical in all Member States and the related tax debt is in fact collected (see, by analogy, judgment of 5 April 2001, *van de Water*, C-325/99, EU:C:2001:201, paragraphs 39 and 41).

33 In that regard, as the Advocate General observed in point 29 of his Opinion, the intention of the EU legislature was to lay down a broad definition, in Article 33(3) of Directive 2008/118, of the category of persons liable to pay excise duty in the event of a movement of excise goods already 'released for consumption' in one Member State and held, for commercial purposes, in another Member State in order to be delivered or used there, so as to ensure, so far as possible, that such duty is collected.

34 However, to impose an additional condition requiring that the 'person … holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty.

35 That interpretation of Article 33(3) of Directive 2008/118 is without prejudice to the possibility, where provided for by national law, for the person who, under that provision, has paid the excise duty that has become chargeable to bring an action for a contribution or indemnity against another person liable to pay that duty (see, by analogy, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 44).

36 In the light of the foregoing, the answer to the questions referred is that Article 33(3) of Directive 2008/118 must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than those the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 33(3) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

[Signatures]