Butlers Ship Stores Ltd & Ors v HMRC [2012] UKFTT 371 (TC) A Ground-Breaking Tax Case

Terra Firma member, Derek Francis, successfully appeared in the Tax Chamber (Gordon Reid QC of Terra Firma and Dr. Heidi Poon) in *Butlers Ship Stores Ltd & Ors v HMRC* [2012] UKFTT 371 (TC) ("*BSSL v HMRC*") for HMRC. The case concerned consignments of vodka and whisky dispatched from an excise warehouse in Aberdeen in duty suspension ostensibly to other such warehouses in Estonia and Spain. Although apparently regular paperwork which accompanied the consignments seemed to vouch the arrival of the products at the ostensible destinations, they did not in fact arrive there. The duty on the consignments was lost to HMRC. HMRC raised assessments on the warehousekeeper of dispatch, the Appellants. The basis of the assessments was that each movement consisted of duty suspended goods being despatched from a UK warehouse, which had not reached their destination within four months, that there was an irregularity which was not detected in the UK, and that therefore r. 4 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 SI No 3022 ("DSMEG") applied. The excise duty point was the time when the goods left Butlers' warehouse. Having regard to the terms of r. 7 of the 2001 Regulations and the Accompanying Administrative Documents (AADs), Butlers as consignor – since no-one else was entered in box 10 of the AAD; r. 7 – was liable to pay the duty. HMRC imposed these assessments on Butlers by virtue of s. 12(1A) of the Finance Act 1994. It was common ground that Butlers was not involved in or aware of the diversion fraud. The Tribunal found that the warehousekeeper had used every reasonable measure in its power to avoid participation in the fraudulent evasion of duty.

Excise diversion fraud occurs on an industrial scale and has generated much case law. The Tribunal held that, the aims and objectives of Council Directive 92/12/EEC (repealed by Council Directive 2008/118/EC; but it is thought that the issues remain live) include the erection of what amounts to a scheme of insurance, whereby the warehousekeeper of dispatch (who provides a movement guarantee – with a commercial guarantor) is strictly liable, subject to exemptions (Art. 14, which the UK failed to transpose) for fortuitous events and *force majeure* and to rights of relief against others who caused the duty point, irrespective of whether he is at fault: whether or not he is party or privy to the criminal conduct from which the departure from the duty suspension results. The case is the first explicitly to recognise that, in dealing with such circumstances, there is no room for principles of proportionality to innovate on the risk allocation (though there are hints of this in *Garrett Trading v HMRC* E101061).

It was contended for the taxpayer, for whom Julian Ghosh QC appeared with Philip Simpson (Philip is also of Terra Firma), that DSMEG, which (imperfectly) transposed the Directive, offended EU principles of proportionality and legal certainty. It was argued that, in fixing liability for the fraudulent conduct of some third party on a dispatching warehousekeeper the UK legislation went beyond what was necessary to protect the revenue. Reliance was placed on a tract of VAT case law, including *Netto Supermarkt GmbH v Finanzamt Malchin Case* C-271/06 and *Teleos plc v C&E Commis*sioners [2008] QB 600 (ECJ). In a VAT context it has repeatedly been held that it would be disproportionate to hold a trader who has taken all reasonable measures in his power to avoid participation in the fraudulent evasion of VAT liable for the shortfall in tax revenues caused by fraudulent acts of third parties because it goes beyond what is necessary in pursuit of the legitimate aim of protecting the exchequer. The Tribunal declined to apply such case law to that effect in an excise duty context, because 92/12/EEC enjoined the fixing of strict liability.

Key to the Tribunal's analysis is a passage at paragraph 12: "What is important is the identification of the aims and objectives of the particular part of the Directive under scrutiny and a consideration whether domestic legislation goes beyond what is strictly necessary to implement those aims and objectives. In some cases it will be apparent that the domestic legislation does go beyond what is strictly necessary in the absence of a *due care* or *circumspect trader* exemption. Those exemptions will be required if the Directive under scrutiny does not impose a strict allocation of risk on the taxpayer." As the very objective of the Directive was (amongst other things) the imposition of strict liability, the scope for principles of proportionality and legal certainty to attenuate liability was negligible or non-existent. As the Tribunal said at para 125, "The essential argument made by Butlers was that there was no sharing of the fiscal consequences of fraud between Butlers and the tax authorities. That is true but that is the consequence of the salient provisions of the 1992 Directive. Stripped to its bare bones, Butlers' argument is that the allocation of risk set forth in the Directive is unfair and disproportionate. That is not an argument to which we can give effect. On this short basis, this second branch of the appeal must also fail."

A subsidiary case for the Appellants relied on the Art. 14 exemptions for fortuitous events and *force majeure*. These, it was accepted, were directly applicable. The argument failed for several reasons. First, the fact that goods are subject to diversion does not constitute "losses" within the meaning of Art. 14, "losses" contemplates irretrievable loss only: *Ministero delle Finanze v Esercizio Magazzini Generali SpA* 1984 3 CMLR 217. Second, even if what occurred constituted "losses" within the meaning of Art. 14, the events producing these losses were foreseeable. EU case law in relation to fortuitous events and *force majeure* showed that such things needed to be unforeseeable.