[2017] UKFTT 858 (TC)

TC06253

Appeal number: TC/2015/00463

EXCISE DUTY – duty and penalties - vehicle containing smuggled cigarettes seized and forfeited - vehicle restored - whether Appellant "making the delivery of the goods" or "holding the goods intended for delivery" - whether Appellant concerned in keeping the goods - whether failure to pay duty deliberate and concealed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JANUSZ LEWANSOWSKI T/A TRANS-SPEC **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

MR DEREK SPELLER FCA

Sitting in public at Taylor House 88 Rosebery Avenue London EC1R 4QU on 16 October 2017

Mr Michael Wiencek, representative for the Appellant

Mr Ben Lloyd, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Lewandowski operates a haulage business as a sole trader. He and his business are based in Poland. Mr Lewandowski does not speak English and he participated in the hearing via an interpreter.

2. The issue before the Tribunal is whether Mr Lewandowski is liable for the excise duty on a quantity of cigarettes which were found in his lorry on its entry into Dover in 2013 and whether he is also liable for a penalty for failing to pay the duty on the footing that he was "concerned in keeping the goods" and his behaviour was "deliberate and concealed".

3. Excise duty in the sum of £120,445 was assessed on 22 December 2014. A wrongdoing penalty on the basis of "deliberate" behaviour amounting to £48,497 was also imposed on 22 December 2014. Following a review, the penalty was increased to £69,255.87 on the basis that the Appellant's behaviour was "deliberate and concealed".

4. The Appellant is appealing against both the duty assessment and the penalty.

5. We had before us a bundle of correspondence and documents and we heard oral evidence from Mr Mark Biddis, the Border Force officer who stopped the Appellant's lorry, Ms Anne Armstrong, the decision maker at HMRC and the Appellant himself (through the interpreter). We also had witness statements from other Border Force officers who were involved with the search and seizure, but who were not called to give evidence.

The facts

6. Mr Lewandowski's lorry was stopped and inspected by officers of UK Border Force on its arrival in Dover on 27 October 2013.

7. Mr Biddis asked the driver, a Mr Jarowslaw Sawicki, about the load. Mr Sawicki did not speak good English, and there was no interpreter present, but Mr Biddis was satisfied that Mr Sawicki understood the questions and was able to hold a basic conversation. The driver said that his load consisted of fridge freezers and produced a CMR form, the standard consignment note, which showed they were bound for John Lewis in Stevenage. The lorry was scanned and there appeared to be further items in the lorry. On opening the back of the lorry, the officer found a second load. Mr Sawicki then produced a second CMR which related to "wooden flooring". The Consignor was a Polish Company called Superhobby.. The goods had been loaded at an address in Warsaw and the delivery address was Mr Pawel Walicki "Beverley Way Unit 7 GB KT34 PT (sic) New Malden".

8. The packs of flooring were foiled and the packs on each pallet were secured with white plastic straps. A Border Force officer cut the straps and moved two of the flooring packs. Noticing that the third pack was lighter, he cut open the pack and discovered a quantity of cigarettes. In total, 534,580 cigarettes were found concealed in the load of laminate flooring. The cigarettes, fridge freezers and lorry were seized under the Customs and Excise Management Act 1979 ("CEMA") and were duly deemed condemned as forfeited under Schedule 5 paragraph 3 of CEMA.

9. Mr Lewandowski's representative, Euro-Lex Partners applied to Border Force, under section 152(b) of CEMA for the lorry and fridge freezers to be restored. Border Force's letter of 29 January set out a summary of its policy on restoration. Where Border Force is satisfied that the haulier or driver is knowingly involved in smuggling excise goods, the vehicle may not be restored or may be restored only on payment of a fee equal to 100% of the revenue involved.

10. If the haulier/driver is not involved in the smuggling attempt, but Border Force is not satisfied that they have carried out "basic reasonable checks which would have identified the illicit load" the vehicle may be restored on the first occasion for a fee equal to 20% of the revenue involved. On a second detection, the vehicle may not be restored.

11. Where the haulier/driver were not involved in the smuggling attempt and "we are satisfied that the driver and haulier have taken reasonable steps to ensure the legitimacy of the load the vehicle may be…restored free of charge".

12. Having considered the policy and all the circumstances surrounding the seizure, Border Force's decision was to restore Mr Lewandowski's lorry free of charge. Although the letter does not go into detail, it is implicit in the decision that Border Force must have concluded that the Appellant and the driver had not been knowingly involved in the smuggling attempt and that they had carried out the required "basic reasonable checks".

13. HMRC are, of course, a different government body from Border Force. Nearly a year later, on 30 September 2014 Ms Armstrong, an officer of HMRC, wrote to the Appellant in connection with the excise duty on the cigarettes. She asked for various pieces of information and informed the Appellant that he may be liable to pay the duty. Ms Armstrong also wrote to the Consignor, Superhobby at the address on the CMR, the driver Mr Sawicki, Eurotransport, the freight forwarder, and Mr Pawel Walicki at the New Malden addresss. Ms Armstrong's research on the internet showed that the address shown on the CMR was that of Halfords. The letters to the driver and Superhobby were returned undelivered. There was no response from Mr Walicki. Ms Armstrong tried to telephone Mr Walicki on the mobile telephone number which Eurotransport had provided to the Appellant's son. There was an automated message in a language that she could not understand.

14. Eurotransport did respond to the letter. It said that it had not been involved with the October 2013 delivery, nor was it aware of the company Superhobby. However, it confirmed that it had used the transport services of the Appellant and his son, Sebastian Lewandowski ("Sebastian") who was also a haulier, trading as SEBOL, for about a year. Although Eurotransport had not arranged the October transport , it had been contacted in September 2013 by Mr Pawel Walicki and it used its subcontractor Mr *Sebastian* Lewandowski (SEBOL) to carry out that delivery. That was the only job they had done for Mr Walicki. They carried out checks at that time, asking for the addresses for collection and delivery. Mr Walicki provided Eurotransport with the addresses which it passed on to SEBOL. Eurotransport said that the haulier should "control the load" and report any inconsistency. SEBOL did not report that anything was wrong. The Eurotransport Transport Order to SEBOL was dated 25 September 2013 and indicated that the goods were to be loaded at "Ann-Pal, Antonin ul. Wroclawska 17", the address shown on the October CMR as the place of loading. The delivery address was "Beberley (sic) Way, New Malden Surrey, KT3 4PT, Unit 7", the same address as was shown as the delivery address on the October CMR. Eurotransport also provided SEBOL with a telephone number for Mr Walicki which Sebastian later passed on to the Appellant.

15. The Appellant's representative wrote to HMRC in response to Ms Armstrong's letter on 21 October 2014 contending that the Appellant was not liable for the duty and did not know about the illicit goods

16. He explained that the Appellant's normal driver was off sick and Mr Sawicki was engaged under a fixed term contract to provide temporary cover. The contract was terminated after the seizure.

17. Euro-Lex also provided evidence that the Appellant had reported a fraud to the local police on 4 November 2013 in that he had been misled as to the contents of the goods to be transported and that he had suffered detriment through the seizure of his lorry. The police decision of 4 December 2013 indicated that they investigated and interviewed the owner and workers at Ann-Pal, the company where the goods had been loaded. This established that a man had come to Ann-Pal in person and asked for for forklift truck services to load six pallets onto a lorry. The goods were delivered in a white van and loaded onto the Appellant's lorry by an Ann-Pal employee. The man who had requested the services then left. The police did not continue the investigation as there was insufficient evidence for them to prosecute anyone. Ms Armstrong admitted that she had not taken account of the fact that the Appellant had made the report and that a person involved in smuggling would be unlikely to report the matter to the police.

18. Euro-Lex's letter also referred to the checks which the Appellant had carried out to verify the legitimacy of the load and we return to that later.

19. On 13 November 2014, Ms Armstrong wrote to the Appellant indicating that she was intending to charge him excise duty and a wrongdoing penalty on the basis that he had "deliberately concealed" the goods. In reaching that decision,

Ms Armstrong had taken account of the following factors. Eurotransport had stated that they simply checked the addresses of consignor and consignee and did not do any due diligence. Mr Lewandowski had relied on the arrangements made in September by his son and did not do his own due diligence checks on the Consignor or addresses. HMRC's research indicated that the delivery address shown in the CMR was that of Halfords. Ms Armstrong refrained from commenting on Border Force's decision to restore the lorry. Her letter stated "At the time Border Force made the decision based on information in your letter dated the 9 December 2013 in which you state due diligence checks had been done by Eurotransport and the address for delivery was legitimate. However information received from Eurotransport by HMRC states that they did no due diligence checks…". We did not have a copy of the 9 December 2013 letter. The information from Eurotransport is presumably that referred to in paragraph 14 above. Ms Armstrong also said in evidence that a further factor was that the driver initially produced only the CMR for the fridge freezers and produced the second CMR only when the lorry was opened and the second load discovered.

20. The penalty for deliberate concealment was on the basis that the haulier was in control of the load and must have known what was in the delivery. The goods were hidden in the laminate flooring so this would be deliberate evasion of the duty.

21. A formal assessment to excise duty was issued on 22 December 2014 in the sum of £120,445 and a penalty on the basis of "deliberate" behaviour in the sum of £48,479 was issued on the same date.

22. Euro-Lex requested a review of the decision and the review conclusion letter was issued on 11 June 2015 upholding the decision on the duty and increasing the penalty to £69,255.87 on the basis of "deliberate and concealed" behaviour.

23. Officer Cunningham who carried out the review noted the points which Ms Armstrong had taken into account as set out above, and the representations of Euro-Lex that the Appellant had nothing to do with the smuggling attempt and as an innocent party should not be required to pay the duty and that the Appellant had not deliberately concealed the cigarettes. In addition, Officer Cunningham noted that the Appellant was aware that the load included the laminate flooring, that the driver only produced the CMR for the flooring, which was handwritten, when the second load was discovered and that this was the second time the Appellant had transported laminate flooring for the same customer to the same address. In fact, the Appellant had only been involved on the second occasion; the first order had been dealt with by his son. She did not consider that Border Force's decision to restore the vehicle free of charge was relevant to her decision. On the basis of these considerations, Officer Cunningham was satisfied that the Appellant was liable to pay the duty as "he was making delivery of the goods" at the duty point and she upheld the assessment.

24. In relation to the wrongdoing penalty imposed under Schedule 41 Finance act 2008, Officer Cunningham set out that the amount of the penalty depends on the

nature of the wrongdoing, whether it is deliberate or not, concealed or not and whether disclosure was prompted or unprompted. She noted that HMRC has discretion as to the amount of the penalty (which is based on the revenue evaded) depending on the degree of co-operation given by the taxpayer. She concluded that Officer Armstrong had been right to give a full reduction for "helping and giving" but only a partial reduction for "telling" because the Appellant had "failed to admit to the wrongdoing and explain how it arose". We would comment that the Appellant may have failed to admit wrongdoing because he was innocent. Officer Cunningham did not accept that Mr Lewandowski was not aware of the cigarettes in the load. As the cigarettes were physically concealed in the laminate flooring and the driver failed to produce the second CMR at the outset the behaviour was deliberate and concealed and the penalty was increased accordingly.

25. The appeal notice was submitted on 20 January 2015, before the review was completed.

26. Mr Lewandowski provided a witness statement and was examined and cross-examined through the interpreter at the hearing. His evidence gave more detail about the events. Mr Walicki had initially approached Sebastian to take the laminate flooring, as before. As his son's lorry was not available at the time, Sebastian asked his father if he would take the load on his lorry. The Appellant's lorry was only half full so he agreed to take the additional load. This was not unusual; he normally took two or three loads at a time. He had no direct contact with the consignor. His son had arranged everything. The arrangement was that once the driver was in the UK he was to contact Mr Walicki's brother, Piotr, on his mobile phone to inform him of the expected time of arrival at the delivery address. He said the this was in accordance with the CMR Convention and common practice.

27. Mr Lewandowski conceded that that he did not himself check the delivery address as it was the same as for the previous delivery his son had dealt with. His son had actually made the September delivery himself and had been to the address so he thought that it was all legitimate. The delivery was made to a storage facility hired by the consignee, which, we were informed was not unusual. The delivery was made to The Big Yellow Self Storage Company, whose address is Unit 1-3 Beverley Way, New Malden KT3 4PH. This is very similar to, though not the same as, the address shown on the CMR. A map was produced which showed that Halfords and The Big Yellow Self Storage Company occupied adjacent blocks in the same industrial estate in Beverley Way, New Malden. HMRC made much of the fact that the CMR showed Halford's address, but it could have been a simple error. In any event, the name "Halfords" did not mean anything to Mr Lewandowski; it is not a known brand in Poland. So far as he was concerned, the delivery was to be to the same storage facility his son had been to only a month before and there was nothing to suggest the address was not legitimate. He said his son had explained to the driver what the place looked like and how to get there.

28. Essentially, in relation to the checks on the consignor and consignee, Mr Lewandowski trusted his son as they were the same as in the case of the delivery carried out by Sebastian. He also believed that Eurotransport had already carried out the due diligence on the consignor and consignee, although Eurotransport said it only checked addresses and it was up to the haulier to do the due diligence. He referred to the copy transport order dated 25 September 2013 (which related to the SEBOL delivery). Clause 5 of Eurotransport's terms stated "*Both the ordering and contracting party shall protect the client, no direct contact is permissible*". Although those terms did not apply to the consignment in question, as Eurotransport was not involved, Mr Lewandowski relied on this to support his belief that the checks had been carried out and again, trusted his son that all was in order. The Appellant said that he would normally have checked the addresses himself but did not this time because of the previous delivery.

29. The Appellant did, however, carry out checks on the load. He also discussed the procedures the driver should take to prevent smuggling with the driver before the journey, in accordance with the CMR Convention. As he is a "one man band" he did not have written procedures (though he does now) but he told the driver about the need to check the load and the documents and the security and safety of the load during the journey.

30. As noted above, the driver picked up the load at Ann-Pal, where it was loaded by an Ann-Pal employee. The driver checked the number of pallets and the appearance of the load to ensure it was not visibly damaged. The driver then brought to load to Trans-Spec's premises where the Appellant also checked it. The goods were packed, foiled and, as the Border Force Officer had noted, secured with bands. The packaging had visible OBI labels on it. We were informed that OBI is a well known (in Poland) hardware/building materials store- the equivalent of, say, B&Q. Neither he nor the driver were permitted to open the packaging to check what was inside. Mr Lewandowski also checked the CMR and the accompanying invoice. The invoice was issued by OBI to Superhobby and related to laminate flooring. The CMR was consistent with the invoice and showed the correct address where the goods had been loaded. The CMR and invoice appeared to be genuine. Mr Lewandowski believed that the transaction was credible based on the appearance of the packed and sealed load, the CMR, the invoice and his son's involvement a month earlier making a delivery of an identical load from and to the same parties at the same addresses. Mr Lewendowski said that there was no indication to the contrary and he did not know that there were cigarettes concealed in the load.

The law

31. Tobacco products, including cigarettes, are subject to excise duty. The time when the excise duty must be paid is known at the "excise duty point" and the Commissioners have power under the Finance (No. 2) Act 1992 to make regulations fixing the excise duty point. The relevant Regulations are the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the Regulations"). Regulation 13 provides:

"(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.
(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; or
(b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P…"

32. The definition of "release for consumption" is set out in article 7(2) of the EU Directive 2008/118 and it is accepted that the cigarettes had been released for consumption within this definition.

33. Section 12 of the Finance Act 1994 gives HMRC power to assess excise duty due from a person. It provides, so far as material:

"(1A) Subject to subsection (4) below, where it appears to the Commissioners—
(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
(b) at the amount due can be ascertained by the Commissioners,
the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative."

34. Schedule 41 Finance Act 2008 provides for HMRC to charge penalties in relation to excise duty.

"Handling goods subject to unpaid excise duty
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.
(2) In sub-paragraph (1)—
"excise duty point" has the meaning given by section 1 of F(No 2)A 1992, and
"goods" has the meaning given by section 1(1) of CEMA 1979.
Degrees of culpability
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.
(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
(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

Amount of penalty: standard amount

…

6B
The penalty payable under any of paragraphs 2, 3(1) and 4 is—
(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,
(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and
(c) for any other case, 30% of the potential lost revenue.
…
6D
Paragraphs 7 to 11 define "potential lost revenue".]
Potential lost revenue
…
10
In the case of acquiring possession of, or being concerned in dealing with, goods the payment of duty on which is outstanding and has not been deferred, the potential lost revenue is an amount equal to the amount of duty due on the goods.
…
Reductions for disclosure
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—
(a) telling HMRC about it,
(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and
(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.
(3) Disclosure of a relevant act or failure—
(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and
(b) otherwise, is "prompted".
(4) In relation to disclosure "quality" includes timing, nature and extent.
[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.
(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—
(a) for a prompted disclosure, in column 2 of the Table, and
(b) for an unprompted disclosure, in column 3 of the Table.
(3) Where the Table shows a different minimum for case A and case B—
(a) the case A minimum applies if—
(i) the penalty is one under paragraph 1, and
(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and
(b) otherwise, the case B minimum applies.]

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	case A: 10% case B: 20%	case A: 0% case B: 10%
45%	case A: 15% case B: 30%	case A: 0% case B: 15%
60%	case A: 20% case B: 40%	case A: 0% case B: 20%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%]

"

35. Under paragraph 14, HMRC may reduce a penalty if they consider it right because there are special circumstances. HMRC did not consider there to be special circumstances in this case.

36. Paragraph 20 provides for "reasonable excuse"

"Reasonable excuse
20
(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure.
(2) For the purposes of sub-paragraph (1)—
(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and
(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

The Appellant's submissions

37. The Appellant was not "making delivery of the goods" or "holding the goods intended for delivery" within Regulation 13 of the Regulations. He was an innocent party and had no knowledge, actual or constructive, about the excise goods.

38. The restoration of the lorry by the Border Force showed that he was innocent.

39. The Border Force officer had said there was nothing suspicious in how the driver acted.

40. HMRC had based their decision on minor errors or failures and had failed to take account of the fact the Appellant had complained to the police about the matter.

41. As the Appellant did not know about the excise goods, he could not have "deliberately concealed" them and is not liable for the wrongdoing penalty.

Respondent's submissions

42. The goods were "held for a commercial purpose in order to be delivered or used in the UK". The Appellant is liable for the duty on the basis that he was "making delivery of the goods" within Regulation 13 and the approach in the cases to the meaning of "holding" is relevant to the meaning of "making delivery". A person can be "making delivery" of goods or "holding" them if he has *de facto* or *de jure* control over them and this does not require legal or beneficial ownership.

43. The Appellant was aware that the goods being transported were excise goods or at the very least he had constructive knowledge of the goods i.e. he should have been aware that the goods were excise goods.

44. The issue of the penalty is distinct from the assessment of the duty and different information may be looked at in reaching the decision.

45. Border Force's decision to restore the lorry is not proof that the Appellant was innocent.

46. The penalty was correctly charged under Paragraph 4 of schedule 41 Finance Act 2008. The amount of the penalty was correctly calculated in accordance with the potential lost revenue, the fact that disclosure was prompted and the Appellant's deliberate and concealed behaviour. Appropriate reductions were made for the level of co-operation given by the Appellant.

Discussion

47. Duty becomes payable at the excise duty point. The excise duty point occurs *"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."* Goods are held for a commercial purpose where they are held by a person other than a private individual (paragraph 13(3) of the Regulations). The excise duty point is when the goods enter the UK port, that is, when the Appellant's lorry arrived at Dover. Excise duty is therefore payable.

48. Regulation 13(2) of the Regulations sets out who is liable for that duty and includes the person "*making delivery of the goods*" and the person "*holding the goods intended for delivery*". The assessment in the present case was made on the basis that Mr Lewandowski was the person "making delivery of the goods" but HMRC submitted that the principles derived from the cases in relation to the meaning of "holding" the goods were also applicable here. That is, whilst the Appellant was not physically making delivery of the goods himself, as the haulier and owner of the vehicle he was nevertheless making delivery of the goods as he was able to exercise *de facto* or *de jure* control over the goods.

49. Both parties relied upon the same authorities in support of their contentions. The leading case is the Court of Appeal case of *R v Taylor and Wood* [2013] EWCA Crim 1151. In this case, Mr Taylor and Mr Wood were both convicted of the criminal offence of fraudulently evading duty. Mr Wood carried on a legitimate freight forwarding business as a "front" for his criminal activities which involved the importation of counterfeit cigarettes. In the course of the conspiracy, Wood engaged a haulier, Brian Yeardley Continental Ltd ("Yeardley") to transport the goods and they sub-contracted a Dutch firm of hauliers Heijboer Transport ("Heijboer") to collect the goods from Belgium and delivery them to the UK. Both Yeardley and Heijboer were innocent agents and neither of them knew or suspected that the load included the counterfeit cigarettes.

50. The Court of Appeal held that Tayor and Wood had been "holding" the cigarettes for the purposes of Regulation 13 of the Regulations, notwithstanding that neither of them had physically been involved in transporting the goods.

51. The Court of Appeal said:

> *"29 "Holding" is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being Re Atlantic Computer Systems plc [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, Goode on Commercial Law, Fourth Edition, p 46 . …*
> *30 In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods, as explained above. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a "holding" of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier. Wood was correctly shown on Yeardley's invoice to be Yeardley's client and the consignee of the goods that were being transported. Under the Convention, as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants.*
> *31 There is nothing, furthermore, in this interpretation and application of Regulation 13(1) to the facts of this case that would be inimical to the purposes of the Finance Act . To seek to impose liability to pay duty on either Heijboer or Yeardley, who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty….a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is*

not a party. To seek to impose liability on entirely innocent agents such as Heijboer or Yeardley, rather than upon the appellants, would no more promote the objectives of the Directive than those of the Regulations."

52. This passage makes it clear that physical possession of the goods is not , of itself, sufficient to constitute "holding" the goods unless the person with possession knew or ought to have known about their nature. The person "holding" the goods is the person who has factual and legal control over the goods: the person who is responsible for the goods. An innocent agent such as Yeardley or Heijboer is not to be regarded as holding the goods. In that case, it was the person who had arranged for the transportation of the concealed cigarettes who was the person regarded as holding the goods.

53. The meaning of "holding" was further considered by the Court of Appeal in *R v Tatham* [2014] EWCA Crim 226. In that case also, the Appellant had been convicted of the fraudulent evasion of duty and it was also necessary to consider the meaning of the word "holding" in the context of Regulation 13. The judge reviewed the case law and summarised the important principles, so far as relevant, as follows:

> *"b. The time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of the UK port (Bajwa at [32], [75] and [89]) ….*
> *c. …*
> *d. … 'holding' for the purposes of Regulation 13(1) can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent (see Taylor & Wood , [28–40]).*
> *e. There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder' …. A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the 'holder' within Regulation 13(1) — Taylor & Wood , [30–31], [35]."*

54. Similar observations were made in *McKeown, Duggan and McPolin v HMRC* [2016] UKUT 479.

55. The principles to be derived from the authorities are clear. A person who has possession of the goods may be a "holder" of them, but physical possession is not essential, nor is legal or beneficial ownership. The critical question is that of control and whether a person has legal and/or practical control over the goods whether directly or through an agent.

56. It is also clear that an innocent agent who neither knew nor ought to have known that the load contained excise goods cannot be the "holder" of those goods.

57. HMRC contend that the Appellant *did* know, or at the very least ought to have known, that the laminate flooring held the cigarettes on the basis that:

- The vehicle and trailer were registered to the Appellant
- The driver did not produce the CMR relating to the flooring until it was discovered that there was a second load
- There was a discrepancy between the delivery address and the postcode on the CMR
- The Appellant accepted that he was aware that the load contained the laminate flooring and in HMRC's view "it is not probable that he was unaware that the load concealed a large quantity of cigarettes. Proper due diligence checks on the load would have revealed its contents"
- The freight forwarder had not arranged the transport and the consignor on the CMR failed to respond to HMRC's letter.
- The fact that Border Force had restored the vehicle was irrelevant.

58. If the Appellant did indeed have actual or constructive knowledge of the presence of the cigarettes in the load, we would agree with HMRC that the Appellant was holding the goods and was liable to pay the duty.

59. We recognise that Border Force is a separate organisation from HMRC, but the fact that they restored the Appellant's vehicle free of charge suggests that they considered that he was an innocent party. Although their decision letter does not say that in terms, in the light of their policy, the only inference to be drawn from the restoration is that they were satisfied that neither Mr Lewandowski nor the driver were complicit in the smuggling attempt and that adequate checks had been made. Although this is not proof of the Appellant's innocence, in our experience, Border Force is unlikely to restore a forfeited vehicle free of charge unless there is cogent evidence that the owner and driver were not involved in the smuggling attempt.

60. The Appellant did, of course, have a duty to carry out proper checks on the consignor and consignee. On the evidence which we heard, it might be said that he should have done more than he did. However, the circumstances in this case were unusual. Mr Lewandowski effectively took on a job intended for his son because his son's lorry was not available. His son had, only a month before, transported a similar load for the same parties to the same destination. He had driven the lorry himself and knew where the storage facility was located. Euro-

transport, the freight forwarder, had been involved on that occasion and Mr Lewandowski believed that they had carried out due diligence on the parties, although the company subsequently told HMRC that it only checked the addresses. The Appellant's son assured him that all was in order. In the circumstances, we consider that Mr Lewandowski can be forgiven for relying on his son's assurances and his failure to carry out his own checks does not indicate any involvement in the smuggling of the cigarettes.

61. The Appellant otherwise acted in accordance with the CMR. He warned his driver of the checks he needed to make. He checked the load himself. It was wrapped and sealed and labelled with the name of a large building materials company. He was not permitted to open the packaging to check on the contents. There was nothing about the load to suggest that it was not what it was declared to be and appeared to be.

62. The discrepancy in the delivery addresses might have been a simple error or might have been a deliberate attempt to mislead on the part of the consignor or consignee. Had Mr Lewandowski checked the address given, he would have found it was an industrial estate which was a reasonable place to be taking such a load. The name "Halfords" meant nothing to him and would not have alerted him to the fact it was an unlikely destination for the flooring. In any event, he had no reason to doubt the legitimacy of the delivery address as his son had actually been there and delivered the previous load to a genuine storage facility.

63. HMRC's case for the Appellant's involvement seems to amount to little more than that the cigarettes were in his lorry and he knew the laminate flooring was being transported. We cannot accept that it follows that "it is not probable that he was unaware that the load concealed a large quantity of cigarettes". On the contrary, on the basis of the evidence, we consider that it is probable that he was unaware. Nor do we accept that "proper due diligence checks on the load would have revealed its contents". Mr Lewandowski did carry out proper checks on the load and short of opening the packages, which he was not permitted to do, it is difficult to see how he could have discovered the illicit goods.

64. We find that Mr Lewandowski did not know about the cigarettes. We considered whether there was anything that should have alerted him to the fact that the load was not legitimate which he had ignored and concluded that there was not.

65. In the light of the authorities set out above and on the basis of our findings that Mr Lewandowski was an innocent agent who did not have actual or constructive knowledge of the excise goods, we conclude that he was not "holding the goods" within the meaning of Regulation 13 of the Regulations. Applying the same principles, he was not "making delivery of the goods".

66. The Appellant is not therefore liable for the duty.

67. HMRC take the view that the penalty is a completely separate matter from the assessment of the duty and whether or not there is an assessment, a penalty may

be payable. The Respondents seek to charge a wrongdoing penalty on the basis that the Appellant was "concerned in …keeping …the goods " and the remaining requirements of paragraph 4(4) of schedule 41to the Finance Act 2008 were satisfied.

68. The focus of the submissions at the hearing was concerned with the Appellant's behaviour and whether it was "deliberate and concealed". We have found that the Appellant's behaviour was not "deliberate" as he did not know that the cigarettes were there and "deliberate" connotes doing an act with knowledge and intention. Although the *goods* were concealed, the *Appellant* did not "make arrangements to conceal [them]" within paragraph 5 (3) of schedule 41. We find that the Appellant's behaviour was therefore neither deliberate nor concealed.

69. We heard little argument about whether a penalty was due in the first place. HMRC assert that the Appellant was "concerned in keeping the goods" after the excise duty point which renders him liable to a penalty. These provisions are penal. They are imposed for wrongdoing. It cannot have been intended that a penalty be imposed on a person who had no involvement with the failure to pay the duty and was the innocent agent of those who intended to evade it and took steps to do so.

70. Indeed, if such a person were to be liable, the reduction for disclosure provisions in paragraphs 12 and 13 of schedule 41 of the 2008 Act would mean that a guilty person who made an unprompted disclosure might receive a nil penalty, but an innocent person who did not make a disclosure because he was unaware that he had anything to disclose would always be liable for a minimum penalty of 10% of the potential lost revenue. That cannot be right.

71. We do not consider that "keeping" can mean mere possession of the goods. The requirement to be "concerned" in keeping the goods implies an element of knowing involvement. We do not consider that a person who neither knows nor has any reason to believe that his vehicle is carrying illicit goods can be said to be "concerned" in the keeping of them. Accordingly, we do not agree that Mr Lewandowski was "concerned in the keeping of the goods" within paragraph 5.

72. HMRC may be right in principle that a person does not need to be assessed for the duty in order to be charged a penalty. The activities which are subject to a penalty under paragraph 4 of the schedule are wider than those which render a person liable to pay the duty. They relate to those who are involved in handling or dealing with the goods after they have arrived at the excise duty point, for example, those to whom the goods are delivered for onward distribution. As we have seen, HMRC have a choice as to the person to be assessed for the duty. It may be that they seek the duty from one or more of those people and also impose penalties on all of those involved in the wrongdoing including those subsequently involved in dealing with or handling the illicit goods who are not liable for the duty itself. But, just as a person without actual or constructive knowledge of the goods cannot be regarded as "holding" the goods, we consider that a person who is in unwitting physical possession of the goods but who does

not have any knowledge of them equally cannot be regarded as "keeping" the goods. Paragraph 4 does not, in our view, entitle HMRC to charge a penalty on a person who was not involved in the wrongdoing in the sense that he had no actual or constructive knowledge that he was doing anything wrong.

73. If we are wrong about this and a penalty is in principle exigible, then Mr Lewandowski plainly had a reasonable excuse for his actions: he was unaware of the existence of the dutiable goods and was simply carrying out his obligations under what he reasonably believed to be a legitimate transport contract.

Decision

74. For the reasons set out above, we have decided that the Appellant was not liable to pay the excise duty and that he was not liable to pay the wrongdoing penalty.

75. We therefore cancel HMRC's decisions and allow the appeals.

76. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE
RELEASE DATE: 4 December 2017